

**Democracy and Constitutional  
Recognition: The political role of  
nationalism in modern democracy**

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## **Abstract**

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### DEMOCRACY AND CONSTITUTIONAL RECOGNITION?

Does modern democracy require social cohesion? Is the nation-state the answer to this need? Is the constitutional protection of republican values enough? In Europe, the template of the national state bounded by a liberal constitution has provided the answer to these questions. However, authors like Habermas and Tully argue that the idea of a substantive relation between a homogeneous national-population and the constitutional state is stretched to its limits by pluralism and globalisation. On the one hand, pluralism pushes the template of the nation-state, which assumes the ethnic uniformity of the population under the umbrella of a republican constitution, to its limits. On the other hand, international organisations like the United Nation and the European Union have taken the role of guarantor of republican values. Habermas proposes a new solution to the problematic relation between republican values and democracy. He asserts that a new model of social cohesion is needed: a democratic society should be founded exclusively on the acceptance of a system of constitutionally established rules which are the logical result of the historical evolution of constitution making. In contrast with Habermas, Tully argues that a democratic process based on the acceptance of liberal values will provide the template for a modern multinational society. In this thesis,

I will point out the democratic incoherence and the internal shortcomings of these alternatives to the nation-state, and I shall argue that a theoretical substitute of the national state should radically reconsider the role of national identities in a modern pluralistic society. Constitutional law can be more than formally legal only if two normative conditions are satisfied: public discourse exists in the public sphere and the legal system includes the recognition of multinationalism. Thus, certain demands originating from national identities will not pass the rationality test of a democratic debate. The point is, however, that this can be considered as a normative presupposition in the public sphere only after discussion and it would not exclude the possibility of a constitutional system which promotes and defends national identity/ies.

## **Declaration of originality**

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I hereby declare that, except otherwise stated, the research recorded in this thesis and the thesis itself was composed by myself in the Law School of the University of Edinburgh.

Tuesday, 25 January 2005



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## INTRODUCTION

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What is nationalism? What is its relation with constitutional democracy? These questions will accompany us in this thesis. However, the role of the two queries will be different. In what follows, the first query will be suspended. It will keep coming back, but the reader will not find in the text a substantive answer. This will frustrate cosmopolitans and some nationalists. How can we understand the role of nationalism in modern democracy without first knowing what nationalism is? Should we consider only Civic nationalism? Like the one Tony Blair seems to endorse here:

*“There are issues of democratic accountability in Europe – the so called democratic deficit. But we can spend hours on end, trying to devise a perfect form of European Democracy and get nowhere. The truth is, the primary sources of democratic accountability in Europe are the directly elected and representative institutions of the nations of Europe – national parliaments and governments. That is not to say Europe will not in future generations develop its own strong demos or polity, but it hasn’t yet. And let no-one be in any doubt: nations like Poland, who struggled so*



*hard to achieve statehood, whose citizens shed  
their blood in that cause, are not going to give it  
up lightly.*"<sup>1</sup>

Or, should our analyses include the ideological interpretation of nationalism like the one suggested by Savigny and Herder?

There are two reasons for not engaging in this issue. First, modern constitutional democracy does not need to know which are the substantive motivations that support a political claim. The debate over the meaning of nationalism and the reason for supporting the protection of its role in modern democracy is a dynamic political issue that cannot be solved by a single constitutional norm or by a constitutional theory such as federalism. In what follows, I will explain that the theory of constitutional democracy should set the procedural limits within which a political solution, such as defining the role of nationalism in modern democracy, can be retrieved. In other words, I argue that the tension between nationalism and constitutional democracy cannot be dissipated in a definitive constitutional solution such as federalism and 'subsidiarity'. It is a common mistake to use constitutional norms as reference for forcing political solutions unsupported by a democratic debate. I will argue that this is the error shared by liberals such as Laden<sup>2</sup> and republicans

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<sup>1</sup> T. Blair, *Check against Delivery* (Warsaw: 2000).

<sup>2</sup> A. S. Laden, *Reasonably Radical : Deliberative Liberalism and the Politics of Identity*, (Ithaca: Cornell University Press, 2001).

such as Habermas<sup>3</sup> on their analysis of the relationship between nationalism and constitutional democracy. By rejecting these interpretations of the role of nationalism in modern democracy, we have to seek an alternative theory which allows the constitutional recognition of national identities and protects democracy.

Second, there are various interpretations of nationalism. By taking one as a normative criterion for developing a constitutional theory (which allows its democratic inclusion or exclusion), we promote social and political homogenisation. In the last decade, nationalism has spread throughout Europe. In the former communist countries, nationalism has revived ethnic divisions which we thought were confined to history books, and on the rest of the continent the new-left has endorsed ethnicity as a functional linkage between population and democracy. This nationalist revival has prompted a multitude of studies on the role of nationalism in modern society. The aim of these studies is to find out the relation between nationalistic claims and the future of European integration. Authors such as Keating,<sup>4</sup> MacCormick,<sup>5</sup> and Miller<sup>6</sup> to name just a few, and institutions such the

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<sup>3</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.

<sup>4</sup> M. Keating, "So Many Nations, So Few States: Territory and Nationalism in the Global Era", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 39-65.

<sup>5</sup> N. MacCormick, *Questioning Sovereignty Law, State and Nation in the European Commonwealth*, (Oxford: Oxford University Press, 1999).

<sup>6</sup> D. Miller, *On Nationality*, (Oxford: Clarendon Press, 1995).



European Commission<sup>7</sup> have produced various proposals that try to accommodate a legal protection of national identity with European integration. Nevertheless nationalism, both at national and regional level, is either interpreted as an irrational social phenomenon which supports antidemocratic political claims (*e.g.* Habermas) or it is considered a substantive aspect of modern politics which guarantees the political stability of the polity (*e.g.* Canovan<sup>8</sup> and Weiler<sup>9</sup>). These studies, which greatly diverge in their conclusions, adopt the same methodological structure. First, they adopt a definition of nationalism which they consider truthful (*e.g.* nationalism is a set of irrational mental images) and link it to some political issues (*e.g.* protection of minorities or the right of self-determination). Next, they elaborate a theory grounded on this definition. Finally, they test the theory on the solution of the political issues considered associated with their chosen definition of nationalism.

In contrast with the methodology of these studies, I argue that there is relatively little research on the role of national identities in modern constitutional democracy. If we accept that nationalism is part of modern democracy, should we accept that all its claims are discussed in the political arena? It is important to answer these questions. Discussion over political issues produce effects on a polity

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<sup>7</sup> European Commission, European Governance Debate. 2002. Ht lm. Available: [http://europa.eu.int/comm/governance/contributions/index\\_en.htm](http://europa.eu.int/comm/governance/contributions/index_en.htm).

<sup>8</sup> M. Canovan, Nationhood and Political Theory, (Cheltenham: Edward Elgar, 1996),.

<sup>9</sup> J. H. H. Weiler, The Constitution of Europe : "Do the New Clothes Have an Emperor?" and Other Essays on European Integration, (Cambridge: Cambridge University Press, 1999), J. H. H. Weiler, "The Promised Constitutional Land." Kings College Law Journal 12/1 (2001), 5-16

independently from the outcomes of the debate. The democratic arena has the function of making people aware of any political issue raised by the members of the polity, but this amplification is strategically used by political entities for gathering support for antidemocratic demands.

Nationalists argue that there are no alternatives to the sense of sharing a common identity, which ties democratic political decisions to single members of the national community. This idea supports the political model of the present day nation-state and its right of international self-determination. The fact that we all reside in this political form of association is often taken for granted, but Habermas explains how in the eighteenth century the nation-state superseded the Empire which was the most common political form of political association and helped the formation of the modern constitutional democracy. The template of the nation-state, which we have inherited from the development of the nation state, is grounded on the idea of ethnic uniformity of a population under the umbrella of a republican constitution. This allows the separation between members and aliens; between 'us' and 'them'.

This supposition is blatantly counterfactual. There is not such a thing as a uniform ethnic community within a modern state. Even the 27,000 residents of the republic of San Marino cannot claim ethnic

homogeneity;<sup>10</sup> but this is a trivial point. The issue here is that the concept of one single nation-state cannot develop the basic function of constitutional democracy: the creation of social integration. In this aspect, modern democracy is different from ancient democracy where decisions were taken with the participation of all free members of an ethnically homogeneous community. Modern constitutional democracy is based on the assumption that indirect democracy practically guarantees the linkage between different national groups and their representatives. However, nationalists argue that democratic participation by itself cannot make people obey the decisions taken in the political arena. To guarantee the individual's commitment to decision arising from a majority, we need to share a sense of belonging which normatively precede the legitimacy of the democratic process; this is provided by nationalism.

However, the logic of linking the shared social sense of belonging to the national community, and then to the individual's loyalty to the law is problematic. By assuming that nationalism is the link between legality and state stability, the nation-state aprioristically excludes those who refuse to conform to the given model of political association. This, I agree with Habermas, drives the template of the nation-state into an irresolvable legitimation crisis. To solve this problem, he argues that the sense of "community" in a democratic society should be founded exclusively on the acceptance and support

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<sup>10</sup> NationMaster.com, Encyclopaedia: Demographics of San Marino, 2004,  
Available: <http://www.nationmaster.com/encyclopedia/Demographics-of-San-Marino>

of a system of constitutionally established rules, which are the logical result of the historical evolution of republicanism. An account of the constitutional process which was the catalyst the formation of the modern state should provide the criteria for a rational set of norms which will exclude nationalism from the political arena. Even if I agree with Habermas, when he points out the normative problems of linking the state apparatus to a national identity, I do not share his conclusions.<sup>11</sup>

In contrast with Habermas I argue that all modern states are multinational, and nationalist claims cannot only be considered as elements of the democratic process. I suggest that the state should acknowledge national identities and provide a procedure for allowing their claims into the debate. This hypothesis is unpersuasive in one crucial matter. Which are the political limits of nationalism in modern democracy? The answer to this question has pragmatic implications: Should we accept that a white national minority can exclude black people from democracy? Should we accept that female members of a nation have no political rights since this conforms to the tradition of that national identity? Should we reject democracy and adopt a

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<sup>11</sup> His idea of constitutional patriotism is theoretically precarious and democratically inconsistent. His hypothesis stimulated an array of critiques focused on the weakness of a community restricted by a constitutional agreement. In contrast with these critiques, I will argue that Habermas' proposal aprioristically excludes political entities from the political arena. By *a priori* ruling out these entities, he reduces the democratic coherence of the political decision making process.

military regime on the grounds that this better represents our national aspiration?<sup>12</sup>

The dilemma here is that, on the one hand, we want to protect our democracies from the abuse of extremist groups, yet on the other hand, if the process of recognition of national identity is limited by some narrow minded procedural limitations, national identities will feel unrepresented by the decisions taken in the political arena. Obviously, this paradox cannot be theoretically solved but I will suggest pragmatic responses to it.

This thesis divided into 6 chapters. In the **first chapter**, I will introduce the terminology, which I will use throughout the thesis. I explain, with the help of Habermas, why we need an alternative model to the nation-state. The template of the modern nation combines liberalism with the assumption that we live in an ethnically uniform community. The sense of belonging to the national community supports the system of basic rights and freedoms of modern liberal societies. Habermas makes clear that linking democracy to a system of substantive values is irrational.<sup>13</sup> He argues that the substantive relationship between the state and nationalism is a precarious historical fabrication which cannot solve the tension within a socially

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<sup>12</sup> The referendum which annexed Austria to Hitler's Germany is an historical example of how a democratic community can democratically decide to degenerate into a dictatorship.

<sup>13</sup> This claim was firstly elaborated by Habermas in his *Legitimation Crisis*. He argues that in society based on the protection of private interests will be unavoidably divided between those 'who have' and those 'who have not'. This tension between people and a legal system which protects private interest cannot be solved by the sense of belonging to the national community. J. Habermas, *Legitimation Crisis*, (London: Heinemann, 1976), J. Habermas, *The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society*, (Cambridge: Polity, 1989), 4), J. Habermas, *Toward a Rational Society : Student Protest, Science and Politics*, (London: Heinemann Educational, 1971).



divided capitalistic society. In **chapter 2**, I will continue on the same methodological path as followed by Habermas. I will explain that, even if I agree with his analysis of the lack of a substantive relationship between the state and nation, he cannot use an historical analysis for labelling nationalism as an irrational political phenomenon. This has to do with the relativism of his historical and sociological account. Taking from the examples provided by modern political theorists, such as MacCormick<sup>14</sup> and Miller,<sup>15</sup> I will explain how these authors starting from the same sociological analyses arrive at an opposite solution. The problem here is that little is known about the relationship between socio-political movements and rationality and what we know suggest that one cannot label nationalism as an irrational political movement.

In the **third chapter**, I will analyse Habermas' template for a constitutionally patriotic state. I argue that Habermas cannot exclude a political stance without endangering the republican values he intends to defend. I will test against the liberal template of the nation-state and we will analyse the theoretical and pragmatic effects of aprioristically<sup>16</sup> excluding nationalism from the political arena. For instance, I will discuss how constitutional patriotism would settle the hypothetical case of a land dispute between a Palestinian and a Jewish settler, the

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<sup>14</sup> N. MacCormick, *Can Nationalism Be Intellectually Respectable?*, 1991), N. MacCormick, *The English Constitution, the British State and the Scottish Anomaly*, 2000).

<sup>15</sup> D. Miller, "Bounded Citizenship", in ed/s R. Dannreuther, *Cosmopolitan Citizenship*, (Basingstoke: Macmillan, 1999),

<sup>16</sup> In what follow, I will use the term *a priori* with the meaning: *Derived by or designating the process of reasoning without reference to particular facts or experience.*

protection of minorities and the democratic deficit of the European Union.

In the **fourth chapter**, I argue that nationalism is an axiological element of modern society which can demand the constitutional recognition of its role in modern society. I will draw this idea from Tully's theory of constitutional multinationalism, which explains that a process of recognition is a multiphase dialogue between members of the national group and its 'aliens'. The typical phases of this process include an internal debate within the community which might lead to a referendum. In the **fifth chapter**, I will explain the limits of Tully's theory of multinationalism. I argue that his idea of adopting Laden's political liberalism as a template for accommodating nationalistic demands is incoherent. I will use again the same examples I proposed in the third chapter to clarify the effects of political liberalism in the process of recognising a national identity.

In the **sixth chapter**, I will explain that constitutional multinationalism cannot normatively solve some of the dilemmas related to the recognition of a national identity, such as: can we limit the process of constitutional recognition of national identity? Are all national groups entitled to national self-determination? However, it suggests some procedures for allowing a democratic debate over these issues. This solution seems a combination of Habermas' communicative democracy and Tully's constitutional multinationalism. On the one hand, I accept that open deliberative

democracy is the only procedure which can link democratic decisions to the individual subjected to these decisions. Any derogation to this procedure is at the expense of democratic coherence and legitimacy. On the other hand, national groups are political entities which have to be constitutionally recognised. This is the result of the democratic process. I conclude by arguing that a democratic society should be founded exclusively on the acceptance of a system of constitutionally established norms that accept the role of national identities in a modern multinational society.



## CHAPTER 1

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### TWO METHODOLOGICAL TASKS: CLARIFYING THE MEANING OF TERMS AND SETTING THE FRAME OF THE DEBATE

As I mentioned in the introduction the final aim of this thesis is to propose an analysis of the relationship between nationalism and constitutional democracy. Before starting the elaboration of this, we have to do two methodological tasks. Firstly, I have to clarify the terms which I will use throughout the thesis by providing some basic ‘working definitions’. These definitions should not be considered normative presuppositions, but only theoretical devices for opening the discussion over the role of nationalism in modern democracy. I will go back to this point on chapter five when we will discuss the use of words in a political theory – at least Wittgenstein's interpretation of it <sup>17</sup> -, for now it is important to provide the reader with some basic definitions to explain my interpretation of the role of nationalism in modern democracy. Secondly, if a study seeks to analyse the role of nationalism in modern constitutional states, it must explain which

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<sup>17</sup> L. Wittgenstein and G. E. M. Anscombe, *Philosophical Investigations*, (Oxford: Blackwell, 1968). See in particular: J. Tully, "Political Philosophy as a Critical Activity." *Political Theory* 30/4 (2002), 533-55

elements of the relationship between the two are relevant. This critical activity explains the importance of analysis of the role of nationalism in modern democracy and it will set the limits of our analysis.

There are a plethora of studies on both nationalism and democratic theories, which might overwhelm a theoretical analysis of the relationship between the two. It is important to decide what is relevant and what is not. In this task, I will follow the methodological steps of Habermas' account of the role of nationalism in modern society.<sup>18</sup> I will start by pointing out the irrelevance of some of debates over the historical connection between state and nationalism. Then, I will discuss the relationship between the rational basis of nationalism and modern constitutional democracy. This should provide the spring board for the next methodological phase, where I will propose my personal interpretation of the relationship between democracy and nationalism. Bearing in mind this sort of 'road map' we can start our journey by explaining some basic definitions and the use of the terms. These definitions are the basic equipment of the traveller, her boots and the backpack without which she can go nowhere.

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<sup>18</sup> His works – such as *The Postnational Constellation* or *The inclusion of the other* - are taken as reference for both cosmopolitans and nationalist supporters. J. Habermas, "Toward a Cosmopolitan Europe," *Journal of Democracy* 14/4 (2003), 86-100, J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001). J. Habermas, et al., *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001).

## 1. THE MEANING OF TERMS

### A) A CONSTITUTIONAL OR A THEORETICAL PROPOSAL?

In this thesis, the term **constitutional** will be used in a broad sense. Such an analysis – like the one suggested here- is not a constitutional proposal but a theoretical account of the role of nationalism in a modern constitutional democracy. It is important to clarify this point since many constitutional theories (such as the ones that support constitutional federalism) are confused with theoretical proposals (such as the ones proposed by Tully and Habermas). Let us make this point clearer. In spite of the fact that authors such as Habermas make direct reference to a missing European constitution,<sup>19</sup> his hypothesis should be considered a theoretical analysis of the evolution of European constitution making. The constitutional difficulties of implementing his conclusions are contingently – not theoretically - relevant to the European constitutional project. Like Habermas' constitutional patriotism, this thesis should be read as a theoretical proposal which supports the idea of a new relation between the state and its population.

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<sup>19</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27, J. Habermas, "The European Nation-State and the Pressures of Globalization." *New Left Review* (1999), 46-59, J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." *Praxis international* 12/1 (1992), 1-19

*"Today, as the nation-state finds itself challenged from within by the explosive potential of multiculturalism and from without by the pressure of globalisation, the question which arises is whether there is a functional equivalent for the fusion of the nation of citizens with the ethnic nation."*<sup>20</sup>

Habermas' own answer to this question is the endorsement of communicative democracy and the exclusion of the ambiguous relation between nationalism and state. This point cannot be rebutted by a pragmatic evaluation such as the one proposed by Weiler<sup>21</sup>, which argues that the lack of these common cultural aspects will make the project of a European Constitution politically unstable. *"I would argue that in the modern notion of the European organisational national – state, the state is to be seen principally as an instrument, the organisational framework within which the nation is to realise its potentialities."*<sup>22</sup> Habermas does not deny a factual connection between the sense of belonging to a particular ethnic community and the political commitment to its legal system,<sup>23</sup> but the problem of how the

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<sup>20</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.117

<sup>21</sup> J. H. H. Weiler, *The Constitution of Europe : "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999), J. H. H. Weiler, "The Promised Constitutional Land." *Kings College Law Journal* 12/1 (2001), 5-16

<sup>22</sup> J. H. H. Weiler, *The Constitution of Europe : "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999).p.339

<sup>23</sup> J. Habermas, "Toward a Cosmopolitan Europe." *Journal of Democracy* 14/4 (2003), 86-100, J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001), J.

relationship between demos and legal system is sustained is a theoretical problem not a pragmatic one. Thus, Weiler might argue that pragmatically the political stability of modern states is underpinned by the shared sense of belonging to the national community, but this does not solve the problematic relationships between state, national identity, and democracy. Instead, Habermas' proposal argues that the idea of sharing a common identity as a political justification of the state is based on an irrational psychological belief – he refers to Anderson's mental images<sup>24</sup> -.

I will explain later (chapter 3) that his exclusion of nationalism from modern democracy is unsupported, but for now it is important to make clear that his proposal cannot be criticized for being constitutionally unworkable – such as Weiler does - . Political theorists who want to propose an analysis of the role of nationalism in modern democracy – such as Habermas, Tully<sup>25</sup>, Laden<sup>26</sup>, and MacCormick<sup>27</sup>, - have to be defiant of pragmatic difficulties and in their works they have to avoid making facts fit hypotheses. Habermas' constitutional patriotism is not an exception to the rule. The reasoning proposed with constitutional patriotism stands upon a normative presupposition which considers

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Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27, J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." *Praxis international* 12/1 (1992), 1-19

<sup>24</sup> B. Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

<sup>25</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995).

<sup>26</sup> A. S. Laden, "Outline of a Theory of Reasonable Deliberation." *Canadian Journal of Philosophy* 30/4 (2000), 551-80, A. S. Laden, *Reasonably Radical : Deliberative Liberalism and the Politics of Identity*, (Ithaca: Cornell University Press, 2001).

<sup>27</sup> N. MacCormick, *Questioning Sovereignty Law, State and Nation in the European Commonwealth*, (Oxford: Oxford University Press, 1999).



democracy the only source of legitimacy and then it suggests an exclusion of nationalism from democracy. Thus, these proposals cannot be criticized by pointing out that the stability of modern constitutions is pragmatically related to the protection of national interests.

These critiques confuse the examples used for supporting a particular point, such as the relationship between Swiss federal constitutions and Swiss national identities, with the theory which suggests them. Obviously, it is the reader's prerogative to challenge the veracity of the examples proposed in a theory, or indeed the correctness of the reasoning deduced from them. However, examples in political theory are there to support a point not to be used as templates for a normative proposal. For instance, Habermas points out that multiethnic societies – such as the United States of America and Switzerland – do not attach the protection of republicanism or their political stability to the sense of belonging to an ethnic community. These two instances support the possibility of having a state unbounded from the idea of nation - not to suggest Switzerland or America are templates for his patriotic state -. The American constitution certainly represents the first historical example of a liberal constitution, whereas Habermas has spent most of his career explaining the incongruence and the shortcomings of liberalism.<sup>28</sup> These examples are put forward to

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<sup>28</sup> See for instance: J. Habermas, Toward a Rational Society : Student Protest, Science and Politics, (London: Heinemann Educational, 1971), J. Habermas, Legitimation Crisis, (London: Heinemann, 1976), J. Habermas, The Structural Transformation of the Public Sphere : An Inquiry into a Category of

support the uncertainty of the belief which presumes the impossibility of having a state without a national population. Only a superficial reading of Habermas' proposal<sup>§</sup> would consider them as templates for a European federal constitution.

B) ETHNIC COMMUNITY, NATION, NATIONAL IDENTITY AND NATIONALISM: WHICH WORD SHOULD WE USE?

As I made clear on the previous part of this thesis, our main aim is to study the role of nationalism in modern democracy. However before starting the analysis of the connection between the two, we have to explain my use of terms such as nation, national identity, patriotism, and nationalism. These words represent - and mean - something different depending on the context in which they are used. For instance, there is a negative connotation attached to nationalism, whereas patriotism seems more appealing to the great majority of the public. This occurs, if the terms are often used to reinforce each other. The meaning of the word patriotism echoes in sentences such as 'it is a patriotic duty of all citizens to protect their national interests'. Ideas such as these ones are easier to accept by a democratic community, than 'a nation should have the possibility to expand and flourish'. The first affirmation refers to the protection of republican values and the second to imperialistic policies. However, the common usage of the two words is not clearly distinguishable and both assertions might

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Bourgeois Society, (Cambridge: Polity, 1989), J. Habermas, Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy, (Cambridge: Polity Press, 1996).

support a policy of antidemocratic exploitation of other people and their resources, infringement of human rights, and war. This uncertainty on the use of words is a general problem of any political theory. As I mentioned earlier, we will discuss more about this point in chapter 5 ( where we will analyse the relationship between the usage of language and political theories) for now it is important to point out the meaning we will associate to key words such as nation.<sup>29</sup>

I will use the term '**nation**' to indicate a community in which members share a particular set of beliefs. These beliefs refer to a mythological past – which is considered as ideological - or to common ethnic features - which are objectively measured.

However, it is normatively impossible to distinguish between the two. Sharing some cultural elements helps members of the national community – and the others – to distinguish between themselves and aliens. These distinctive cultural elements have the same function as the t-shirt of football fans since they allow the creation of a distinction between 'them' and us'. The most obvious of these cultural features is the idiom spoken by the community and the geographical space in which the community resides, but neither of these elements is essential for creating a national identity. We have both cases of a nation which speaks different languages – such as India - and cases in which the national community does not have a geographical area of

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<sup>29</sup> I have to stress again that these definitions will be our 'basic equipment' for our journey of exploration on the analysis of the relationship between national identity and constitutional democracy.



residence – such as the Gypsies -. The whirlpool of studies on ethnicity has increased - instead of diminishing the uncertainty on the normative boundaries of the ethnic community. Given there is not a clear distinction between ethnic nationalism and ideological nationalism, in what follows the meaning of the term *nation* is *inclusive of both anthropological and ideological interpretations*.

With the term ‘**cultural diversity**’, I will describe all the elements that join and diversify civil society. We will see that the protection of cultural diversity and democracy are closely related. I will use the term ‘**nationalism**’ as the ensemble of political claims which want to support and protect the national identity. This includes the activity of nationalist political parties, which are often labelled as undemocratic, and all those demands which simply want to protect an aspect of the national heritage – such as language, sacred sites, tradition *etc.*-. Given that it is impossible to clearly define when a political claim is discriminatory and when it is not – at least in a communicative democracy -, I will adopt a neutral interpretation of the word nationalism which will include *all political demands which support the concept of national identity*. Finally, I will use the term ‘**exclusion**’ and ‘**unilateral secession**’ as political claims unrelated to sociological analyses of the efficiency of the relationship between individuals and state apparatus.<sup>30</sup>

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<sup>30</sup> A. O. Hirschman, *Exit, Voice, and Loyalty : Responses to Decline in Firms, Organizations, and States*, (Cambridge, Mass.: Harvard University Press, 1970).

### C) THE PROTECTION OF REPUBLICAN VALUES AND CIVIC NATIONALISM

Cosmopolitans – such as Habermas - argue that nationalism is a dangerous political element of modern society which might endanger ‘**republican values**’. The coherence of this claim will be discussed in the third chapter but before we examine the details of this point, we should clarify my use of the term republican values. As Christodoulidis<sup>31</sup> argues, the term republicanism covers certain political theories that assert a connection between law and a system of procedural values. “*Republicanism is a theory about how political sovereignty finds expression in law. Law, claim the republicans, substantiates popular sovereignty by lending it constitutional provisions as vehicle or ‘home’ of political deliberation.*”<sup>32</sup> Liberals and supporters of republicanism argue that a democratic community should have some basic rights which are constitutionally protected. However, republicans assert that there is something more to the relationship between democracy and law. They argue that the deliberative process allows a democratic society to express its political power.

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<sup>31</sup> E. Christodoulidis, Law and Reflexive Politics, (Dordrecht: Kluwer, 1998).Ch. 2

<sup>32</sup> *Ibid.*p.10

*“Both [republicanism and liberalism] seek a home for political deliberation in the Constitution. It is in the freedom of speech, broadly understood, that both see political sovereignty substantiated in law. The citizen is free and sovereign in that his/her speech is uncompromised. Both liberal and republican constitutionalism begin from this premise. While both locate the site of political deliberation in the Constitution, the republicans attribute far more decisive functions to constitutional political deliberation. For them, the political is rooted in law, and it is from the constitution that it draws for backing and aspiration.”<sup>33</sup>*

The complex interrelationship between law, citizenship and democracy is established by the political debate. They contest an understanding of constitutional norms which place restrictions on political and economic bargaining. Republicans – such as Habermas<sup>34</sup>, Arendt<sup>35</sup> *etc.* – argue that the procedures which form modern constitutional norms provide the linkage between *demos*, politics, and citizenship.

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<sup>33</sup> My emphasis. Ibid.p.10

<sup>34</sup> J. Habermas, *The Theory of Communicative Action*, (London: Heinemann, 1984).

<sup>35</sup> See for instance: H. Arendt, *Between Past and Future : Eight Exercises in Political Thought*, (Harmondsworth: Penguin, 1977).

From this hypothesis, Habermas states that citizenship is a cosmopolitan category.<sup>36</sup> This interpretation – Christodoulidis argues - of the relationship between democracy and constitution goes back to ancient Greek political theory.

*“There are strong resonances here of the ‘Aristotelian’ politics of the polis [Italic on the original text], a tradition that envisages man as a ‘political being’ who could only realise his ‘telos’ [Italic on the original text] in a ‘vivere civile’, [Italic on the original text] a republic, as there are of Rousseau’s concept of politics as the expression of the civic will of the people, and the republicanism of Hannah Arendt.”*<sup>37</sup>

The point that republicans make – Christodoulidis argues - is that membership in the political community is the practice of partaking perspectives and discussing with one another - not the protection of goods or values- . These values and goods are only procedural elements which maintain the political coherency of the community.

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<sup>36</sup> J. Habermas, "Toward a Cosmopolitan Europe." *Journal of Democracy* 14/4 (2003), 86-100, J. Habermas, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999). Similar point are made by: F. I. Michelman, "Terry Firma: Background Democracy and Constitutional Foundations." *Michigan Law Review* 99/8 (2001), 1827-52

<sup>37</sup> E. Christodoulidis, *Law and Reflexive Politics*, (Dordrecht: Kluwer, 1998).p.17 See also: H. Arendt, *The Origins of Totalitarianism*, (London: G. Allen & Unwin, 1958), H. Arendt and Charles R. Walgreen Foundation for the Study of American Institutions., *The Human Condition*, (Chicago: University of Chicago Press, 1958).

*“Whereas in the liberal/pluralist world-view, politics is about promoting diverse goods and thus relies on bargaining within a framework of rules neutral to the bargaining parties, the republican picture of politics is one of the pursuits of the “**common good**”[Bold in the original text].*

*In their account, the heterogeneity of interest (of the Hobbesian rent-seekers), associated with liberalism, gives way to the heterogeneity of perspective. Bargaining gives way to arguing, and this shift allows republicans to claim “**civic virtue**”[Bold in the original text] for their politics”.*<sup>38</sup>

While all the republicans share the basic idea of the interrelationship between community, politics and law, they differ in their analyses of how this connection is constructed. Some authors – such as Habermas<sup>39</sup> – consider public debate the proper forum for deliberative practice; others rely on institutional activities of the constitutional

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<sup>38</sup> My Emphasis: E. Christodoulidis, Law and Reflexive Politics, (Dordrecht: Kluwer, 1998).p.17 Christodoulidis refer to Michelman.

<sup>39</sup> See for instance: J. Habermas, Legitimation Crisis, (London: Heinemann, 1976), J. Habermas, The Theory of Communicative Action, (London: Heinemann, 1984), J. Habermas, Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy, (Cambridge: Polity Press, 1996).

court – such as Michelman<sup>40</sup> or the parliament – such as Sunstein<sup>41</sup> -.

We will see in the last chapter how this distinction plays a role on the evaluation of a demand of unilateral secession, but for now let us continue on our brief analysis of republicanism.

The republican account of the relation between democracy and nationalism should be also distinguished from the analysis of the so-called ‘**civic nationalism**’. Supporters of a civic nationalism – such as Smith<sup>42</sup> – argue that we should conceptually distinguish between ethnic and civic nationalism. Ethnic nationalism supports an idea of sharing an ideological belief – and might degenerate into racism -, civic nationalism accepts and gives backing to democratic values.<sup>43</sup> Civic nationalists – or supporters of a hybrid idea between the two such as MacCormick<sup>44</sup> – directly support the system of substantial liberal rights and goods which are heavily criticized by republicans such as Habermas for being democratically incoherent. Republicans propose a procedural template of democracy which provides the deliberative space for debating political questions and reaching a consensus on the

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<sup>40</sup> F. I. Michelman, "Law's Republic." *Yale Journal of International Law* 97/ (1988), 1493 See also the more recent: F. I. Michelman, "The Problem of Constitutional Interpretative Disagreement", in ed/s M. Aboulafia, et al., *Habermas & Pragmatism*, (London ; New York: Routledge, 2002),

<sup>41</sup> C. R. Sunstein, "Political Conflict and Legal Agreement." *Tanner Lectures on Human Values* 17/ (1996), 137-250, C. R. Sunstein, "Congress, Constitutional Moments, and the Cost-Benefit State." *Stanford Law Review* 48/2 (1996), 247-310

<sup>42</sup> See for instance: A. D. Smith, *Theories of Nationalism*, (London: Duckworth, 1971), A. D. Smith, *Ethnicity and Nationalism*, (Leiden ; New York: E.J. Brill, 1992), A. D. Smith, *Nationalism : Theory, Ideology, History*, (Cambridge: Polity Press ; Blackwell, 2001).

<sup>43</sup> As I mentioned earlier there is the theoretical problems of distinguishing an ethnic group which support antidemocratic claims from the national community which supports civic values. We will discuss this point extensively in chapter 3.

<sup>44</sup> N. MacCormick, *The Scottish Debate : Essays on Scottish Nationalism*, (London ; New York: Oxford University Press, 1970), N. MacCormick, *Can Nationalism Be Intellectually Respectable?*, (1991), N. MacCormick, *Questioning Sovereignty Law, State and Nation in the European Commonwealth*, (Oxford: Oxford University Press, 1999), N. MacCormick, *The English Constitution, the British State and the Scottish Anomaly*, (2000).



problem of the common good. Again, this is in contrast with civic nationalism. No one is coerced into adopting a pre-determinate political perspective which endorses the existence of a national community or liberal values such as civic nationalists argue. In the republican model of democracy, the dialogue tends to enhance rather than to diminish cultural and political diversity. In contrast with civic nationalism, the republicans invite all perspectives into the political arena without considering the idea of nation as a support of moral and political claims.<sup>45</sup>

#### D) THE USE OF THE TERMS DEMOCRACY AND RADICALISM

Let us continue the clarification of the use of terms by explaining the meaning of words such as democracy and radicalism. I will refer to the term **democracy** as the praxis which links political choices to those who are subjected to these decisions. At first sight this definition depicts democracy as a procedure without any linkage to substantive values, but I will make clear that the protection of the practice which connects the political recognition of cultural diversity, which might include national identities and constitutional norms, is a substantive element in any free society. Thus, I will not endorse a relativistic prospective – in which all political models of societies are normatively equal, instead I will argue that we should adopt a procedurally open model of ‘**communicative democracy**’ similar to the one suggested

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<sup>45</sup> E. Christodoulidis, Law and Reflexive Politics, (Dordrecht: Kluwer, 1998).p.41

by Habermas in his theory of communicative action. This is the only possible template of political association which can link national identities to constitutional norms.

This radicalized interpretation of democracy should be distinguished from the one proposed by authors such as Mouffe<sup>46</sup> and Tully.<sup>47</sup> I will argue that his idea of **radicalism** is compromised by his endorsement of liberal values. The authors propose a philosophical reinterpretation of the principles of equality and individualism which wants to preserve the legal framework within which liberal values are protected. This point is clarified by Mouffe when she argues that the liberal values which underpin modern constitutional society are axiological elements of modern democracy.

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<sup>46</sup> C. Mouffe, "Deliberative Democracy or Agonistic Pluralism?" *Social Research* 66/3 (1999), 745-58

<sup>47</sup> J. Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy." *Modern Law Review* 65/2 (2002), 204-28, J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995), J. Tully, "The Agonic Freedom of Citizens." *Economy and Society* 28/2 (1999), 161-82



*"In 'Hegemony and Socialist Strategy', Ernesto Laclau and I attempt a reformulation of the socialist project in terms of "radical and plural democracy", by arguing that it should be conceived as the radicalisation and deepening of democratic revolution – as the extension of the democratic ideals of liberty - and equality to more and more areas of social life. The aim is not to create a completely different kind of society, but to use the symbolic resources of the liberal democratic tradition to struggle against relations of subordination."*<sup>48</sup>

These 'radical democrats' argue that endorsing the liberal right of having a self-organised life within a certain regime does not mean we have to support individualism or economic liberalism. Instead, they argue that at the moment in which we relinquish the idea of a homogeneous society and we accept the fact that modern society is pluralistic, liberal institutions become the greatest contribution to modernity. *"Pluralism, understood as the principle that individuals should have the possibility to organise their lives as they wish, to choose their own ends, and to realise their lives as they wish, to choose their own ends and to realise them as they think best is the*

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<sup>48</sup> C. Mouffe, "Radical Democracy or Liberal Democracy?" in ed/s D. Trend, Radical Democracy: Identity, Citizenship, and the State, (London: Routledge, 1996), 19-26.

*greatest contribution of liberalism to modern society.”*<sup>49</sup> This interpretation of the relation between cultural diversity and democratic institutions relies on the assumption that democracy cannot stand on its own feet and it needs a system of limitations, which avoids degenerating into dictatorship. These controls are only functional to the protection of democracy and they do not promote the values of individualism and capitalism. In other words, individual freedom is an *a priori* value of democracy.

By supporting this thesis, radical democrats seem to propose a theory which situates itself in the middle ground between the acceptance of the liberal regime, and the Marxist critique of capitalism<sup>50</sup>. On one hand, they reject the socialist analysis of the state's institutions as an instrument of power that enforces a system of values which oppresses the poor and protects the wealthier. The system of legal rights and the institutions which enforce these rights are necessary elements if a society wants the guaranteed stability and democracy. On the other hand, radical democracy is critical of the ideological support which liberal institutions provide to capitalism.

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<sup>49</sup> Ibid.in ed/s p.20

<sup>50</sup> See for instance: C. Mouffe and E. Laclau, Hegemony and Socialist Strategy : Towards a Radical Democratic Politics, (London: Verso, 1985).

*"To promote a project of radical and plural democracy we need to create a strong alliance over the ethical-political principles of modern democracy. Only on that condition will the extension of the ideals of liberty and equality become the driving force of a democratic politics. The current dominance of an instrumentalist model of politics is an obstacle to a real understanding of the radical potential of the liberal democratic regime."*<sup>51</sup>

Radical democrats argue that the function of liberal institutions is not to protect liberal values but to protect democracy from degenerating into populism, cultural homogenisation, and dictatorship. They suggest that the function of liberal legal institutions is separable from the ideological element which supported their making.

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<sup>51</sup> C. Mouffe, "Radical Democracy or Liberal Democracy?" in ed/s D. Trend, Radical Democracy: Identity, Citizenship, and the State, (London: Routledge, 1996), 19-26.p.23

*“Liberal individualism is unable to understand the formation of a collective identities and it cannot grasp that the collective aspect of social life is constitutive. [...] The liberal idea that general interest results from the free play of private interests and that a universal rational consensus can result from free discussion prevents liberalism from comprehending the nature of the political.”<sup>52</sup>*

The discussion of political issues is a critical activity which maintains the connection between people's aspirations and constitutional norms. The tension, which continually emerges between these last two elements, supports the political debate - which is the only source of Legitimacy -.

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<sup>52</sup> Ibid.in ed/s p.22

*“Democratic advances have usually been the result of the process of displacement of rights along a double axis: either new groups have claimed the access to rights already declared, or new rights have been demanded in social relations hitherto considered ‘naturally’ hierarchical, such those concerned with race, gender, etc. Radical democracy must acknowledge that the articulation of the ideas of popular sovereignty and civic equality with the liberal themes of natural rights [...] has made it possible for new rights to be claimed and new meanings, new uses and new fields of application to be created for the ideas of liberty and equality. It is within such a framework that the struggle for a free and equal society has to be waged. It is high time to adhere to Norberto Bobbio’s long-held conviction that liberal democratic institutions should be an essential part of any democratisation process, and that socialist goals can only be achieved in any acceptable way within a liberal democratic regime. One objection to a strategy of democratisation as the fulfilment of the*

*principles of liberal democracy is that capitalistic relations constitute an insuperable obstacle to the realisation of democracy.[...] However this identification is not a necessary one, as some liberals argue. Rather, it is the result of an articulatory practice, and as such it can therefore be broken. Political liberalism and economic liberalism need to be distinguished and then separated from each other.*"<sup>53</sup>

In this – rather lengthy – quotation we find the basic assumptions of radical democracy which Tully endorses in his analysis of the relation between democracy and national identity.<sup>54</sup> I will go back to this point on chapter 5 for now let us simply say that radical democrats such as Tully cannot endorse the protection of liberalism – as Bobbio does – since liberal values falsified the process of recognition of national identity.

In liberal states, the theoretical procedure which guides the ruling out of irrational claims such as the one proposed by nationalist groups is relatively straightforward. Firstly, there is a substantive evaluation of the compatibility of these political entities with a hypothetical set of democratic values, which are embedded in liberal societies. Secondly,

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<sup>53</sup> C. Mouffe, *Dimensions of Radical Democracy : Pluralism, Citizenship, Community*, (London: Verso, 1992). p.2

<sup>54</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995), J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 1-35.



if political claims supported by these movements are considered “democratically intolerable” the exclusion might be inserted into the legal system by a decision adopted either by a legislative body or by a jurisdictional account of the incompatibility of the political claims by a jurisdictional institution – such as a constitutional court -. However, linking democracy with a substantive set of values – such as the ones supported by liberals and ‘radical’ (*sic*) democrats – cannot be but democratically unsupported.

## 2. THE IMPORTANCE OF THE RELATIONSHIP BETWEEN NATION AND STATE

Once the use of terms such as national identity and democracy is clearly set, we have to continue in our task of making clear the normative limits of our discussion over the relationship between national identity and constitutional democracy. The issue here is how to exclude debates which are correlated to both nationalism and political theories but are not relevant to the relationship between the two. This process of reducing our debate to a workable size is methodologically crucial in an analysis of the role of nationalism in modern democracy since both fields of research provide an uninterrupted flow of high level theoretical material. Therefore, deciding which hypothesis is relevant and which is not is a delicate task which will affect the normative solidity of my successive claims. The obvious risk is to overlook pertinent studies and transform the whole thesis into a tautological exercise, which confirms its

presuppositions. It is for this reason that I adopted the same methodological approach proposed by an experienced political theorist such as Habermas.<sup>55</sup> Ultimately, he argues that the role of nationalism in modern democracy should be theoretically reduced to three discussions:

- the analysis of the historical relation between state and nation,
- the dialogue over the rational admissibility of nationalistic claims in the modern state,
- the connection between national identity and democracy.<sup>56</sup>

The understanding of these three debate is important.

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<sup>55</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27, J. Habermas, "The European Nation-State and the Pressures of Globalization." *New Left Review* (1999), 46-59, J. Habermas, "On the Relation between the Nation, the Rule of Law and Democracy", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), p. 128 - 53, J. Habermas, "Does Europe Need a Constitution?" in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), : 154 - 61, J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001).

<sup>56</sup> This analysis was prompted by a partial rebuttal to his critique of capitalistic society. In his *Legitimation Crisis* (J. Habermas, *Legitimation Crisis*, (London: Heinemann, 1976).) Habermas argues that the state's protection of liberal values with democracy is irrational. He explains that liberal societies rely on the logic of the market and on the protection of private interests to support their legal system but a substantive linkage between law and liberalism aprioristically excludes political claims which are intolerable with the theoretical basis of liberalism. This exclusion has a detrimental effect on the rationality of the liberal state which finds itself unsupported by those who are not sharing its idea of justice and fairness. This critique which Habermas sees its logic conclusion in *Habermas' Theory of Communicative Action* (J. Habermas, *The Theory of Communicative Action*, (London: Heinemann, 1984).) where he proposes a procedural alternative to the liberal state. In that work he argues that a modern nation-state's legal system should be based on the communicative participation of all citizens. This conclusion was rebutted by communitarians. Apart from the critiques of contra-factuality which focused on practical difficulties of transforming parliamentary democracy into an ideal democracy for all, communitarians (M. Walzer, *The Politics of Ethnicity*, (Harvard: Belknap Press of Harvard University Press, 1982).) - who concur with Habermas' critique of liberalism - point out that social cohesion within liberal democracies is granted by a pre-political sharing of a common identity. In a nut shell, they argue that liberalism protects republican values, and a shared sense of belonging to the national community ensures social cohesion. These two aspects of modernity - they argue - are linked by a symbiotic relationship within the modern state but they are theoretically separable. They conclude their critique saying that Habermas mistakenly criticized liberalism for not providing something which is given by being members of the national community. This critique casts doubts over Habermas' account of the liberal state and over his hypothesis of deliberative democracy. This criticism and the revival of nationalism which followed the unification of the two Germanys motivated Habermas to write about nationalism and its relation with modern state. In this thesis the whirlpool of German politics will be kept at the side, instead we will focus on how Habermas attempts to clarify the relationship between constitutional democracy and national identity.

*"For the democratic constitutional state guarantees equality before the law, in the sense that all citizens are to have an equal opportunity to exercise their rights. John Rawls, the most influential theoretical politician of political liberalism writing today, speaks in this connection of the 'fair value' of equitably distributed rights. [...] In constructing the post-war Europe, politicians of all stripes were guided by this dynamic conception of the democratic progress. Today, we are coming to an awareness that this idea has so far been realized in the framework of the nation-state."*<sup>57</sup>

I agree with Habermas when he argues that the historical linkage between nationalism and the protection of republican values is pushed to its limits by globalisation. *"The nation-state at one time guarded its territorial and social boundaries with a zeal bordering on the neurotic. Today these defences have long since been penetrated by inexorable transactional developments."*<sup>58</sup> He explains that globalization affects all areas of modern living, but it is in the field of economics that the scale of this social phenomenon is most evident.

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<sup>57</sup> J. Habermas, "The European Nation-State and the Pressures of Globalization." *New Left Review* (1999), 46-59 p.47

<sup>58</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.120.

*"The welfare-state mass democracies on the Western model now face the end of a 200 year developmental process that began with the revolutionary birth of the modern nation-states. [...] The phenomena of the territorial state, the nation, and a popular economy constituted within national borders form a historical constellation in which the democratic process assumed a more or less convincing institutional form [...] Today, developments summarized under the term 'globalisation' have put this entire constellation into question."*<sup>59</sup>

States' borders cannot separate national economies from international trading. They cannot control internal markets and support a welfare system which implements national social policies. After the world economic crisis of the twenties, the necessity of limited control over national economies - in Keynesian terms - was favoured even by liberals who saw the devastating effects of a completely unrestrained economy. This consensus around the beneficial effects of limited state intervention gave the reason for the implementation of redistributive policies which guaranteed an effective social justice.<sup>60</sup> This had -

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<sup>59</sup> My emphasis: J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001).p.60

<sup>60</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27. p.121

Habermas argues - a paradoxical effect on the relation between the universal values of the liberal state and its population. These policies which directly satisfy universal individual aspirations – such as the shortening of the working day, the advantage of free education *etc.* – reinforced the linkage between the liberal state and the national population. *“Although capitalism from its inception was a global development, the economic dynamic was fostered by the modern state system and in turn had the effect of reinforcing the nation state.”*<sup>61</sup>

However, Habermas suggests that this connection between state and nation has been eroded by the development of a global economy which is gradually taking over the state’s control of its internal market.

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<sup>61</sup> Ibid.in ed/s p.121 The same point is repeated in : J. Habermas, "Toward a Cosmopolitan Europe." Journal of Democracy 14/4 (2003), 86-100

*"But with the recent trend towards the denationalization of the economy, national politics is gradually losing its influence over enterprises that orient their investments decision with a global horizon. They are caught in the dilemma of having to avoid two equally unreasonable reactions. A policy of protectionist isolationism and the formation of defensive cartels are hopeless, but balancing the budget through cut backs in the domain of social policy is no less dangerous in view of its likely social consequences."*<sup>62</sup>

This trend, which is often associated with the term globalisation makes the state relinquish the management of its economy. This has pragmatic and theoretical effects. Firstly, it cannot guarantee the efficiency of its welfare system – and this includes free access to education, health care *etc.* – which was originally inserted for implementing the principles of equality. Secondly, the hijacking of the national economy by non-democratic entities – such as international organizations and multinational corporations – constantly increases the economic areas which are out of the state's control.<sup>63</sup> Obvious

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<sup>62</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, The Inclusion of the Other : Studies in Political Theory, (Cambridge: Polity, 1999), :105 - 27. p.122

<sup>63</sup> J. Habermas, "The European Nation-State and the Pressures of Globalization." New Left Review (1999), 46-59p.49



examples of the state losing control of its economy can be found in Central American states in which internal economies rely on the export of a single product - such as bananas - which is bought by multinational cartels at a fixed price<sup>64</sup>.

“[A] state that it is increasingly ‘*entangled*’  
[Italic in the original text] in the  
*interdependencies between the global economy*  
*and global society is seeing its autonomy,*  
*capacity for action, and democratic substance*  
*diminish.*”<sup>65</sup>

Habermas argues that there are three responses to the globalization trend. The first theoretical answer to globalization suggests that we should adopt cosmopolitanism and the universal values of liberalism as an alternative template to the ethnic based nation-state. Supporters of this proposal – such as Rawls - assert that a combination of constitutional protection of republican values with a liberalised economy is the solution to the democratic decline of the nation-state. Habermas agrees on the fact that once approved constitutional norms are theoretically binding, however in his previous works - such as *Legitimation Crisis* - he made clear that the protection of private interests cannot support a model of social inclusion. The second and the third reactions to the erosion of the democratic prerogatives of the

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<sup>64</sup> A similar effect is produced by the activity of International organizations - such as the World Trade Organization, the European Union *etc.*

<sup>65</sup> J. Habermas, "The European Nation-State and the Pressures of Globalization." *New Left Review* (1999), 46-59p.48

nation state are endorsing nationalism. One supports the idea that all nations should be free and independent within their territory.

This hypothesis - Habermas argues - has paved the path for xenophobia and ethnic cleansing. The break-up of the former Yugoslavia is the latest European example in which ethnicity led to a full scale ethnic war. The theoretical incongruence of this idea of a modern state is the aprioristic exclusion of the process of self-identification of the *demos* in the legal system which is a democratic requirement of modern society. The other reaction to globalization proposes a 'third way' between universal liberal values and reactionary nationalism. This form of nationalism - which sometime takes the name of civic nationalism<sup>66</sup> - is more complex. Firstly, it emerges from the acceptance of globalization. Secondly, it is supported by leftwing theorists who used to deny the rational basis of nationalism. Supporters of this 'third way' - such as Giddens<sup>67</sup> - who interpret social solidarity as the liberal principle of equal opportunities assimilate the protection of democratic values to the protection of national identity. This theoretical proposal finds its way into European politics as the new-left - such as the New-Labour party in the United Kingdom or the Democratic Left Party in Italy - which exchanged its leftist ideals with the support of a free economy. However, this "run for the centre" is not limited to an adoption of different universal

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<sup>66</sup> J. Hearn, *Big City : Civic Symbolism and Scottish Nationalism*, 2003), D. Brown, *Contemporary Nationalism : Civic, Ethnocultural and Multicultural Politics*, (London: Routledge, 2000).

<sup>67</sup> A. Giddens, *The Third Way : The Renewal of Social Democracy*, (Cambridge: Polity Press, 1998).

claims; it also includes a support for a revisited form of nationalism which is associated with the protection of democratic values.<sup>68</sup> Obviously, caution in sending the United Kingdom on the track of more collaboration with the European Union strategically helps to win the vote of British Euro-sceptics, but there is more than “*spinning*” on the position adopted by Europe’s new left. The new element on the political manifesto of the European left is the acknowledgment that ethnicity is part of the process which guarantees a linkage between democratic institutions and their population.

Even if I disagree with some of Habermas' conclusions, I concur with him when he rejects both interpretations – the one that revisited the concept of the ethnic state and the so called *third way* -.<sup>69</sup> The idea which associate nation with state are obsolete and modern constitutional democracy needs to reinterpret the role of nationalism in a modern democracy. Then the question is how could we propose an alternative to the present day relationship between nation and state? Moreover -, and even more compelling, - what is the modern role of nationalism in modern constitutional democracy?

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<sup>68</sup> See for example this passage of Tony Blair’s Speech. Also quoted in introduction “The truth is, the primary sources of democratic accountability in Europe are the directly elected and representative institutions of the nations of Europe – national parliaments and governments - . That is not to say Europe will not in future generations develop its own strong demos or polity, but it hasn’t yet. And let no-one be in any doubt: nations such as Poland, who struggled so hard to achieve statehood, whose citizens shed their blood in that cause, are not going to give it up lightly.” T. Blair, Check against Delivery (Warsaw: 2000).

<sup>69</sup> However, I disagree with him when he argues that nationalism is based on a set of irrational beliefs (such as the myth of an original ethnic population) which support a set of incoherent political claims (such as the right of self-determination of the nation and unilateral secession) which should be excluded from the political arena. We will discuss this point in chapter 3.

A) OUR RELEVANT AREAS OF STUDY: THE HISTORICAL CONNECTION  
BETWEEN NATION AND STATE

Habermas argues that the discussions over the historical relation between state and nationalism, the irrationality of nationalism, and the effect of this irrationality on the protection of republican values support a reinterpretation of the role of nationalism in modern democracy which he named constitutional patriotism. The key stone of this model is the aprioristic exclusion of nationalistic claims from the political arena. I will explain later - in chapter 3 - that I disagree with his ruling out of nationalism from modern democracy, but for now we will follow Habermas systematic analysis of these three debates. This will provide the methodological path for reducing our debate on the role of nationalism in modern constitutional democracy. Let us start with the first of these discussions which focused on the historical assumption that nationalism creates social cohesion, political stability and protects republican values. The formation of the modern nation state and the spread of democracy as a model of governance - Habermas argues – result in the unfounded belief that nationalism and the state protection of republican values are historically connected. *“The nation state and democracy are twins born out of the French Revolution. From a cultural point of view, both have been growing in the shadow of ‘nationalism’* [Italic on the

original text].”<sup>70</sup> Historically the formation of the national-state has followed three different paths. It might have started from an already established kingdom which transformed its subjects into a quasi uniform national population – such as France –, or it could be the result of intellectual campaigns conducted by romantic writers and poets – such as Italy and Germany –, or it could be the result of the process of decolonisation. These three processes have confused the arbitrariness of state’s borders with the moral claim of national self-determination and superseded the political model based on divine right of the royal family. He explains that state and nation are normatively different. The state is the apparatus in charge of collecting taxes and protecting the peace with its borders, whereas the concept of nation refers to a community which shares – or is believed to share –<sup>71</sup> some cultural characteristics. Habermas asserts that the term nation, which is now used as synonymous to state, was used for distinguishing communities which were speaking different languages. This transformation of meaning is connected to the new function attributed to the idea of nation.

Habermas argues that the invention of the nation-state has added an element of social integration to the egalitarian value of republicanism, which in the eighteenth century replaced tribal and local connections.<sup>72</sup>

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<sup>70</sup> J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." *Praxis international* 12/1 (1992), 1-19

<sup>71</sup> As I mentioned earlier, in this thesis the distinction between these two definitions of nation is irrelevant.

<sup>72</sup> "Popular national self-consciousness provided the cultural background against which "subjects" could become politically active "citizens." Belonging to the "nation" made possible for the first time a relation

Habermas makes the point that on one hand this concept solves the problem of the legitimisation of the state, which was previously based on the theological predestination of the royal family. On the other hand, it gives a response to the sense of confusion in individuals who had nothing in common. The idea of the nation – Habermas points out - is the element of union between people and state, and it gives to the state the possibility of considering itself an autonomous entity, which is conceptually detached from its constitutive elements and free to consider itself as an equal subject in the international political arena. Habermas argues that moving the legitimisation of the state from the divine right of the royal family to the right of self-determination of the nation creates a new form of freedom which competes with the two individualistic concepts of freedom “[T]hat of the members of a civil society and that of the political autonomy of citizens”.<sup>73</sup> This new form of autonomy has two pragmatic effects on the political arena. Firstly, it equips national-states with a moral reason to act as individuals who struggle to protect their own private interest in a free market. Secondly, it allows democratic states to behave in the international political arena similarly to the political template supported by the royal family they have just superseded. This includes the idea of a

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*of solidarity between persons who had previously been strangers to one another. Thus the achievement of the nation-state consisted in solving two problems at once: it made possible a new mode of legitimation based on a new more abstract form of social integration.” J. Habermas, “The European Nation State: On the Past and Future of Sovereignty and Citizenship”, in ed/s P. De Greiff, The Inclusion of the Other : Studies in Political Theory, (Cambridge: Polity, 1999), pp: 105 - 27.p.111*

<sup>73</sup> Ibid.in ed/s p.114



right of protecting national interests, with violence if necessary, which before was associated with the defence of the crown.

However, these ideas of defending the national community and protecting republican values - Habermas explains - are conceptually separate. *"The nationalism which was inspired by the works of historians and romantic writers founded a collective identity that played a 'functional' [Italic on the text] role for the implementation of the citizenship that arose in the French Revolution."*<sup>74</sup> In modern times, multiculturalism and globalisation have made the chimera of a homogeneous national population more visible, but he explains that theoretically the incoherency of the binomial relationship between state and nation was clear since it appeared. Habermas gives the example of the 'Germanists' meeting in 1848, - which can be compared to today's European Convention - where intellectuals from all over Germany met to suggest an intellectual base for a newly formed German state detached from the imperial values of the Austrian royal family. The project - Habermas points out - of making the political basis for a state ruled by Germans was faced with theoretical difficulties. *"In this respect things were even more difficult for the German jurists than the philologist. While foreign languages formed nothing more than the back-ground for philologists, Roman*

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<sup>74</sup> J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." Praxis international 12/1 (1992), 1-19p.4

*law still ruled in the jurists own country*”<sup>75</sup>. The German legal system, like all the European legal institutions, relied on Roman codifications, such as the *Corpus Juris Civilis* and *Corpus Juris Canonici*, and on their mediaeval interpretations by Italian scholars, such as Pillio and Accursio . The universal value of this foreign theoretical material was supported by a long interpretative tradition of ancient texts which was alien to the Germans, and by the linkage between these texts and the religious beliefs. The substitution of these universal values which support the Roman legal doctrine with national laws was difficult for constitutional law. On writing about a proposal for a new constitution for Germany theorists had to substitute theological values with the right of self-determination of the nation, and at the same time they had to make a constitutional text without referring to Roman law. “*The juristic version of the doctrine of the people runs into three major difficulties: [...] Above all, they were unable to provide the bases of legitimation for a democratic constitutional state from their own legal-historical resources.*”<sup>76</sup>

The problem was that secular democratic values (which were established during the French Enlightenment) can not substitute the process of social cohesion of a religious society. They believed that

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<sup>75</sup> J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001).p.11

<sup>76</sup> “But such legal-political transformation would have lacked driving force, and formally established republics would have lacked staying power, if a nation of more or less self-conscious citizens had not emerged from a people defined by its subjection to power. This political mobilization called for an idea that was vivid and powerful enough to shape people’s convictions and appealed more strongly to their hearts and minds than the dry ideas of popular sovereignty and human rights. This gap was filled by the modern idea of nation, which first inspired in the inhabitants of state territories an awareness of the new, legally and politically mediated form of community.” J. Habermas and M. Pensky, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001).p.12

this space, which was left empty after the relinquishment of the *ancien* regime, should be filled by the sense of belonging to the national community. The idealised national community substituted the model of social cohesion around the royal family and stood side by side with the new constitutionally protected republican values.<sup>77</sup>

Habermas argues that pluralism and cosmopolitanism have simply magnified the historical shortcomings of nationalism and national state. Multiculturalism constantly increases the gap between the myth of the uniformity of national population and the factuality of cultural pluralism. "*The nation of citizens does not derive its identity from some common ethnic and cultural properties, but rather from the praxis [Italic on the original text] of citizens who actively exercise their civil rights.*"<sup>78</sup> He concludes asserting – and I agree with him – that the modern state is normatively unrelated to the evolution of nationalism. This historical analysis –which is the strongest point of Habermas' critical account of the role of nationalism, is rebutted by political theorists such as Weiler<sup>79</sup> and Canovan<sup>80</sup> who believe in a substantive relationship between political stability and nationalism.

As I mentioned earlier, I do not support all the conclusions which Habermas suggests in his theory of constitutional patriotism – such as

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<sup>77</sup> J. Habermas, "The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship." *Ratio Juris* 9/2 (1996), 125-37p.112.

<sup>78</sup> J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." *Praxis international* 12/1 (1992), 1-19 p.3

<sup>79</sup> J. H. H. Weiler, *The Constitution of Europe : "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999), J. H. H. Weiler, "The Promised Constitutional Land." *Kings College Law Journal* 12/1 (2001), 5-16

<sup>80</sup> M. Canovan, *Nationhood and Political Theory*, (Cheltenham: Edward Elgar, 1996).

the aprioristic exclusion of nationalism as a political movement within political arena -, but I accept that his historical account of the relationship between state, republican values and political stability cannot be criticized with the argumentations which Canovan and Weiler propose. These two authors argue that a state legally bounded only by a constitutional agreement is politically unstable. In particular, Canovan argues that constitutional patriotism relies on Habermas' personal understanding of the relation between nationalism and republicanism, which associates nationalism with racism.<sup>81</sup>

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<sup>81</sup> Communitarians - such as Taylor - make a similar analysis but derive different conclusions. See for example : C. Taylor, "The Liberal-Communitarian Debate", in ed/s N. L. Rosenblum, Liberalism and the Moral Life, (Cambridge, Mass.: Harvard University Press, 1989),, C. Taylor and A. Gutmann, Multiculturalism and "the Politics of Recognition" : An Essay, (Princeton: Princeton University Press, 1992).)

*“What is it, then that is supposed to differentiate 'patriotism' (which is desirable) from 'nationalism' (which is not)? The central claim is that patriotism means the political loyalty of citizens to the free polity they share, whereas nationalism is a matter of ethnicity and culture. While nationhood is taken to be a 'prepolitical' matter depending on ties of birth and blood, the bond that unites citizens in a patriotic polity is a matter of will, the free consent of citizens united by their commitment to liberal democratic principles.”<sup>82</sup>*

She argues that supporters of patriotism in order to distinguish nationalism from patriotism - claim that the former does not suppose or require ethnic and cultural homogeneity and is tolerant of diversity. However, she claims that the project of avoiding the illiberal effect of nationalism by basing the state upon a procedural system is self-defeating. To support her critique she focuses on the examples which Habermas uses to underpin his thesis and she argues that the cases cited to show the plausibility of this kind of patriotism do not in fact do so.<sup>83</sup>

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<sup>82</sup> M. Canovan, *Nationhood and Political Theory*, (Cheltenham: Edward Elgar, 1996).p.3

<sup>83</sup> *Ibid.*p.7

Canovan suggests that there are two theoretical templates of patriotism. One is supporting an idea of a patriotic state underpinned by universal values – she includes Habermas' proposal in this group – . The second, which she names the “*republican rooted version of patriotism*” reads patriotism as the protection of “*the political culture of liberty*”.<sup>84</sup> She does not advocate either. Canovan argues that patriots – of both kinds - misconstrue the political effect of nationalism in modern states and she supports her criticism of Habermas with an analysis of the examples given by the German author. Firstly, she suggests that the Swiss confederation and the United States of America are considered by Habermas the models of his constitutional patriotism, but they cannot support his proposal. She points out that Switzerland adopts a non-inclusive system which highly protects Swiss identity via a strict control over immigration. This is in direct contrast with Habermas' inclusive patriotism. “*Switzerland is indeed less welcoming to immigrants than many more conventional nation-states, and less tolerant of non-Swiss cultural differences. It is a unique polity, in many ways enviable, but it gives little support to the project of cosmopolitan constitutional patriotism.*”<sup>85</sup>

Secondly, the American loyalty to the constitution is understood by Americans as national asset not as a protection of universal values.

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<sup>84</sup> Ibid.p.16

<sup>85</sup> Ibid.p.12



*“The point is that the principles of the constitution are not just liberal principles but (for Americans) ‘our’ [Bold in the original text] principles, handed down to us by our forefathers, [...To think of the USA as a society bound together by constitutional patriotism ‘rather’ [Bold on the original text] than by nationhood is to overlook inheritance - inheritance not only of citizenship, but of the constitution, the principles, and the national mission.”*<sup>86</sup> Similar points are made by authors such as Kymlicka in his analysis of the American promotion of the English language.<sup>87</sup> Canovan concludes her analysis asserting that there are no alternatives to the relationship between nationhood and liberal democracy. The process of distinguishing between patriotism and nationalism depends on an oversimplification which cannot transform the loyalty to a national group into the loyalty to universal principles. *“This kind of polity to which thinkers of both sides find themselves drawn is actually neither pure state nor simple ethnic community: it is a polity that is ‘ours’ [Italic on the original text]. Structured by all the subtle mediations that give nationhood its content and its power.”*<sup>88</sup>

However, I argue that this debate over the historical connection between the senses of loyalty generated by being a member of the national community and the state is unrelated to the discussion over

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<sup>86</sup> Ibid.p.13 [My emphasis]

<sup>87</sup> He develops this point in W. Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights*, (Oxford: Clarendon Press, 1995). For more on this point see also: W. Kymlicka and W. Norman, *Citizenship in Diverse Societies*, (Oxford: Oxford University Press, 2000), W. Kymlicka, *Politics in the Vernacular : Nationalism, Multiculturalism and Citizenship*, (Oxford: Oxford University Press, 2001).

<sup>88</sup> M. Canovan, *Nationhood and Political Theory*, (Cheltenham: Edward Elgar, 1996).p.97

the role of nationalism in constitutional democracy. The dialogue over the historical process, which has created a linkage between members of a national constituency and the protection of republican values, is part of the never-ending historical diatribe. A debate that started with Herder<sup>89</sup> and Savigny and which is over the historical role of nationalism and has nothing to do with a debate over the normative connection between national identity and democracy.<sup>90</sup> Obviously, a democratic community has to be open to political claims based on historical analyses, but the relativistic nature of these analyses simply makes more evident the gulf between the normative requirements of a democratic theory and history.

#### B) THE RELATION BETWEEN RATIONALITY AND NATIONALISM

Once the lack of connection between the historical evolution of the modern state and the concept of national identity is clearly set, we can

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<sup>89</sup> J. G. v. Herder and B. Suphan, *Herders Sämmtliche Werke*, Weidmann, 1877). see also: E. Kedourie, *Nationalism*, (Oxford: Hutchinson, 1960).

<sup>90</sup> Even the part of Canovan's critique in which she argues that Habermas supports an 'empty' universalistic conception of the state is theoretically precarious. In her analysis Canovan does not say that patriotic constitutional law making is a social practice which creates social cohesion and at the same time induces certain forms of protection of republican values which are locally and nationally interpreted. "The political culture of a country crystallizes around its constitution. Each national culture develops a distinctive interpretation of those constitutional principles that are equally embodied in other republican constitutions –such as popular sovereignty and human rights- in light of its own national history. A 'constitutional patriotism' based on this interpretation can take the place originally occupied by nationalism." J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other: Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.118 At first sight, the idea of interpreting the constitution in relation to a specific culture should have included Habermas' patriotism in the group of proposals which Canovan called "republican rooted version of patriotism". "This sort of patriotism has two particularly salient characteristics [...] although it may arise out of 'ethnocultural unity', a 'political culture of liberty' puts stress squarely upon the republican tradition of active citizenship and civic virtue. Secondly and in consequence of this, it is a 'critical' [in italic on the original text] love of the country, dedicated to making sure one's polity lives up to its highest traditions and ideals, if necessary at the cost of unity." M. Canovan, *Nationhood and Political Theory*, (Cheltenham: Edward Elgar, 1996). p.16. This form of patriotism is more similar to her personal analysis of the relation between nationhood and state which ties the sense of loyalty to the national group to the political stability of the state. If Habermas' patriotic constitution were included in 'the republican rooted group', it would have supported Canovan's critique. That is, the patriot state relies on nationalism. However, Habermas' patriotism cannot be categorised in such a group since individual's loyalty to the patriotic constitution is due to his/her awareness of its universal value.

continue to follow Habermas' account on the second debate over **rational basis of nationalism**. He argues, like many cosmopolitans—such as Anderson,<sup>91</sup> Ignatieff<sup>92</sup> etc. - that nationalism is based upon a set of *mental images*<sup>93</sup> which are embedded in the national community. This concept of mental images is used as an explicatory model by different authors such as Deutsch who points out that the support of national differences is based on “*masses of mental images*”.<sup>94</sup> Deutsch explained how these non-rational ideas which set and align “*preferences which at the end guaranteed security and success in a competitive market.*”<sup>95</sup> Many have felt a need for such a group and have answered it by putting their trust in their nation. In spite of the fact that this metaphorical hypothesis has been proposed in order to support different theses the main idea behind it is that nationalism has an irrational ideological framework which can be distinguished from other rational ideologies – such as liberalism, communism -. Clearly referring to this idea, Habermas shows how these sets of mental images bridge the gap that distinguishes the state from the nation state and the population from the national population. “*Popular national conscience crystallised into the “imagined communities” (Anderson) propagated in national histories, which became the catalysts of a new*

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<sup>91</sup> B. Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

<sup>92</sup> M. Ignatieff, *Blood & Belonging : Journeys into the New Nationalism*, (London: Vintage, 1994).

<sup>93</sup> B. Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

<sup>94</sup> K. W. Deutsch, *Nationalism and Social Communication : An Inquiry into the Foundations of Nationality*, (Cambridge: The Technology Press of the Massachusetts Institute of Technology ; John Wiley and Sons ; Chapman and Hall, 1953).p.8

<sup>95</sup> Ibid.

*form of collective self-identification.*"<sup>96</sup> These sets of beliefs solved the problem of finding a legitimated base for the state and they guided the community through a necessary process of social integration toward a homogenous national population.

However, Habermas endorses the cosmopolitan critique of nationalism as political stance and asserts that nations are precarious historical fabrications made in Europe during the nineteenth century that then degenerated into ideological political movements. He argues that that the principle of self-determination - as it is explained by Kant – is related to individual self-determination, whereas nationalists irrationally claim a national right of self-determination.

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<sup>96</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, The Inclusion of the Other : Studies in Political Theory, (Cambridge: Polity, 1999), :105 - 27.p110.

*"Nationalism is the term for a specifically modern phenomenon of cultural integration. This type of national consciousness is formed in a social movement and emerges from modernization processes at the time when people are at once both mobilized and isolated as individuals. Nationalism is a form of collective consciousness which both presupposes a reflexive appropriation of cultural traditions that have been filtered through historiography and which spread only via the channels of modern mass communication. Both elements lend to nationalism the artificial traits of something that is to a certain extent a fabrication, thus rendering it by definition susceptible to manipulative misuse by political elites."*<sup>97</sup>

I agree with Habermas when he argues that nationalism as a political position is interpreted by part of its supporters as a self-evident set of beliefs. This unquestioned conception is the precarious base for the ideological nationalism. However, the deductions which he draws from this analysis are less convincing. Habermas argues that

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<sup>97</sup> J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." Praxis international 12/1 (1992), 1-19p.3



connecting the nation-state with the ethnicity not only is irrational, but it can endanger republican values.<sup>98</sup> This claim passes the limits of the debate over the rational or irrational basis of nationalism as a political stance and draws Habermas – and us with him – into the analysis of the relationship between **nationalism and democracy**. This is the last of the areas of research which he considered relevant for understanding the role of nationalism in modern democracy.

### C) THE RELATION BETWEEN DEMOCRACY AND NATIONALISM

Habermas argues that a rational reading of modern constitutionalism provides the theoretical ground for excluding nationalism – and its claims - from democracy. He argues that modern citizens are linked to constitutionally protected republican values and to the national group with which they share their communal identity. On the one hand, a citizen is in contractual partnership with the liberal set of principles embedded into the constitution. In this relation he or she is obliged to renounce the use of violence to enforce his/her claims and the state is committed to protect his/her fundamental rights. On the other hand, a citizen is an organic member of the national community. A defence of this linkage between cultural and national identity with a political community was recently revived by communitarians such as

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<sup>98</sup> *'The positive self-understanding of one's own nation now became an efficient mechanism for repudiating everything regarded as foreign, for devaluing other nations, and for excluding national, ethnic, and religious minorities, especially Jews'* J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.111.



Taylor<sup>99</sup> and Walzer.<sup>100</sup> In contrast with the communitarians Habermas explains that a psychological linkage between members of the national community and state does not mean that the two elements are conceptually related.

*"Nationalism and republicanism combine the willingness to fight and, if necessary, die for the country. This explains the complementary relation of mutual reinforcement that originally connect nationalism and republicanism, the one becoming the vehicle for the emergence of the other. However, this socio-psychological connection does not mean that the two are linked in conceptual terms."*<sup>101</sup>

Here he seems to concur with liberal nationalists such as MacCormick<sup>102</sup> on the fact that the individual is not to be considered simply a *member* of the nation, but also a *conveyor* of a concrete cultural heritage. These cultural elements create in the individual a set of obligations that lead the member to respect his/her cultural tradition. Because of this, a member of a national identity appears to possess a unique form of *commitment* to the past.

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<sup>99</sup> C. Taylor and A. Gutmann, *Multiculturalism and "the Politics of Recognition" : An Essay*, (Princeton: Princeton University Press, 1992).

<sup>100</sup> M. Walzer, *Spheres of Justice : A Defence of Pluralism and Equality*, (New York: Basic Books, 1983).

<sup>101</sup> J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." *Praxis international* 12/1 (1992), 1-19p.4

<sup>102</sup> N. MacCormick, *Questioning Sovereignty Law, State and Nation in the European Commonwealth*, (Oxford: Oxford University Press, 1999).

*"Nationalism has found its own solution to the problem of boundaries. While national consciousness itself may very well be an artefact, it projects the imaginary reality of the nation as an organic development which, in contrast with the artificial order of enacted law and the construction of the constitutional state, needs no justification beyond its sheer existence."*<sup>103</sup>

However, Habermas suggests that the political success of the traditional nation state is due to a balanced equilibrium between social integration and the republican protection of individual freedom. *"The nation is Janus -faced. Whereas the voluntary nation of citizens is the source of democratic legislation [Staatsbürger], it is the inherited or ascribed nation founded on ethnic membership that secures social integration [Volksgenossen]."*<sup>104</sup>

Habermas argues that if the relationship between the two is not well adjusted there are two possible consequences.<sup>105</sup> Firstly, the community might return to the form of democratic associations which historically preceded the national state – such as the mediaeval belt of Central

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<sup>103</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.116

<sup>104</sup> Ibid.in ed/s p.114

<sup>105</sup> *"This ambivalence remains harmless as long as a cosmopolitan understanding of the nation of citizens is accorded priority over an ethnocentric interpretation of the nation as in a permanent state of war."* Ibid.in ed/s p.115

European Cities<sup>106</sup> -. Every single element of these political associations – such as a city or a region - is socially detached from the other and it is preoccupied on its ethnocentric search for the myth of the original national population. This incessant search for an irrational imagined origin drives apart the members of the association with dangerous democratic consequences. The recent separation of the former Yugoslavia is an example of this process. Secondly, he argues that linking the concept of nation to the political structure of the state might endanger the republican values on which the nation-state is based. But this republican achievement is endangered when the integrative force of the nation of citizens is considered something independent of the political opinion.<sup>107</sup>

To make this point clearer, Habermas takes as example Schmitt's analysis of the relation between majority will and national population. *"Schmitt makes a strict distinction between the "legal" and the "political" components of the constitution and he treats the "nation" as the hinge between the traditional principles of the bourgeois state and the democratic principles of the self-determination of the people."*<sup>108</sup> Nationalists – Habermas explains – consider the political process which leads to the will-formation as an exchange between

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<sup>106</sup> J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." *Praxis international* 12/1 (1992), 1-19 p.2

<sup>107</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.115

<sup>108</sup> J. Habermas, "On the Relation between the Nation, the Rule of Law and Democracy", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), p. 128 - 53.p.134

individuals who already have something in common: ethnicity. This sharing element belongs to the national community which they consider a pre-political feature of modern society. This belief in the external substantive relation between democracy and national identity is detrimental to the protection of republican values since it suggests that the only possible form of democracy is the one supported by a common ethnic back-ground, and it transforms the democratic debate into a search for a national will.<sup>109</sup> If logic cannot be the moral motivation which binds a community to its political decisions - Schmitt argues - then we have to assume that it is the sharing of national cultural characteristics which links legitimacy to the outcomes of a political debate. “What *people want is good just because the people want (it)*”.<sup>110</sup> This assumption (which pre-empts much of today’s communitarianism) makes it possible to subvert the universal system of Human rights.

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<sup>109</sup> “This substantialist understanding of the citizenry is related to an existentialist conception of democratic decision making process. Schmitt conceives of political will-formation as the collective self-affirmation of a people.” Ibid. in ed/s p.135

<sup>110</sup> Here Habermas quotes Schmitt: Ibid.in ed/s p.135

*“The meaning of human rights is exhausted by the private enjoyment of equal liberties, whereas the exercise of political freedom by citizens is supposed to obey a completely different logic. The meaning of democratic self-determination based on ethnic homogeneity is not the political autonomy of individual citizens but rather national independence.”<sup>111</sup>*

Here Habermas seems to agree with Schmitt when he argues that this discrepancy between liberal theory and a world order based on nation-states is theoretical - not factual - . Schmitt points out that a community cannot simply rely on a system of procedural rules but it should also create a model of social cohesion and he concludes by saying that a homogeneous social population is the only guarantee of a substantive relation between democratic decision making and the legal system. Habermas accepts that citizens interact with each other, and this process takes place within a social context which becomes an element of the democratic procedure.<sup>112</sup>

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<sup>111</sup> Ibid.in ed/s p.136

<sup>112</sup> “Whereas the substantive understanding of popular sovereignty assumes an essential interconnection between “freedom” and the ‘external’ [*Italic on the text*] independence of a people, the procedural understanding connects sovereignty with the private and public autonomy granted everybody equally within an association of free and equal subjects. Given the challenges that confront today, I want to argue, the communicative account of republicanism is more appropriate than either an ethno-national or even communitarian conception of the nation, the rule of law, and democracy.” Ibid.in ed/s p.138

However, he argues that states grounded on ethnic homogeneity cannot develop peacefully.<sup>113</sup> In his analysis of the debate over the connection between democracy and nationalism he claims that the only possible solution to the risks associated with the traditional form of the nation state is to renounce this irrational ambivalence and to change the actual structure of the state from nationalistic to patriotic.<sup>114</sup>

*"Compare 'freedom' in the sense of national independence. i.e. collective self-assertion vis-à-vis to other nations, with 'freedom' in the sense of political liberties the individual citizen enjoys within a country; the two notions are so different in meaning that, at a later point, the modern understanding of republican freedom can cut its umbilical links to the womb of the national consciousness which had originally given birth to it."*<sup>115</sup>

He argues that a possible alternative to the irrational nation state is its transformation into a supranational or non-national state. "[W]e can take our orientation on the precarious path toward post-national societies from the very historical model we are on the point of

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<sup>113</sup> "However, examples of multicultural societies like Switzerland and the United States demonstrate that a political culture in the seedbed of which constitutional principle are rooted by no means has to be based on all citizens sharing the same language and cultural origin." Ibid. in ed/s p.142

<sup>114</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.111

<sup>115</sup> J. Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe." *Praxis international* 12/1 (1992), 1-19p.4



*superseding.*"<sup>116</sup> Habermas claims that the model of national social cohesion, which binds citizens who are strangers to one another should not derive from the sense of belonging to the national community, but it should rather spring from individual commitment to the historical evolution of constitution making. In the following chapters (chapter 1 and 2), I will discuss the details of Habermas' idea of patriotic state, but before that we have to set the limits of our the relationship between nationalism and democracy.

### 3. THE LIMITS OF OUR ANALYSIS

In this chapter, I clarified the meaning of the terms such as nation and democracy, then, I explained that an analysis of the role of nationalism in modern democracy cuts across three ongoing debates. First, over the historical connection between nation and state, second, over the rational basis of nationalism and finally, over the linkage between admissibility of nationalism in the political arena. In what follows, we will analyse the details of these debates since they provide the essential background information for understanding the role of nationalism in modern constitutional democracy.

I will argue – like Habermas does - that we cannot prove the existence of substantive link between the historical formation of modern constitutional democracy state and the spreading of nationalism. However, I do not share the conclusion he is drawing from it. I will

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<sup>116</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.107

explain that we should distinguish the irrational sense of belonging to the national community<sup>117</sup> and the political claims proposed by its members. These claims and the political discussions generated by them cannot be aprioristically excluded from the political arena without endangering democracy. This point is essential for reinterpreting the role of nationalism in modern constitutional democracy.

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<sup>117</sup> See for instance: B. Anderson, Imagined Communities : Reflections on the Origin and Spread of Nationalism, (London: Verso, 1983). and M. Walzer, The Politics of Ethnicity, (Harvard: Belknap Press of Harvard University Press, 1982).

## CHAPTER 2

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### IS NATIONALISM IRRATIONAL? THE RELATIVISTIC NATURE OF HABERMAS' ASSESSMENT

We concluded the previous chapter with two questions. Is nationalism an irrational political movement? Is this irrationality the reason for ruling it out from modern democracy? In this chapter, we will discuss the first of these two issues. I will explain that an analysis of the role of nationalism in modern constitutional democracy should provide the procedural framework for discussing political claims and taking political decisions independently from the entities which put them forward. I argue that we cannot assume that there is a pre-existing criterion of political rationality which aprioristically excludes nationalism from the political arena.

In order to explain the details of this point I will continue to follow the model proposed by Habermas' account of the relationship between democracy and national identity. At first sight, Habermas' constitutional patriotism seems to endorse the openness of the political debate, but then it inserts itself in the middle ground between a procedural and a substantive theory of democracy. On the one hand, it argues that the only form of true democracy is the one that allows an open communicative interaction of all citizens. On the other hand, it

seems to criticise nationalism for being a dangerous political “input” into the communicative process that should be aprioristically ruled out from any democratic community.

However, the problem here is the unavoidable relativist nature of rationally assessing a political stance. Habermas argues - like many cosmopolitans - that it is a self-evident truth that nationalism is an irrational aspect of our society, but there is little certainty among sociologists and anthropologists on what nationalism is, or what its functions are in a modern constitutional democracy. By analysing Habermas’ cosmopolitan critique of nationalism, I will make clear the theoretical relativism of this approach. I will explain that sociological and anthropological analyses cannot be considered as axiological elements for a theoretical explanation of the role of nationalism in modern democracy.<sup>118</sup> By arguing the exclusion of nationalism from modern democracy, cosmopolitans such as Habermas anticipated the conclusion of the democratic debate and they propose an unsupported and irrational *a priori* dismissal of all nationalistic claims. Let us see the details of this claim.

## 1. THE CRITIQUE OF THE IDEOLOGICAL NATIONALISM

There is a negative perception attached to nationalism and to all ideological political movements. Habermas, and other political

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<sup>118</sup> In the next chapter, I will expand even further this point. I will make clear that even if we accept that nationalism is irrational, its aprioristic exclusion from the democratic arena cannot be combine to suspend the linkage between *demos* and legal system.

scientists such as Anderson<sup>119</sup>, Benhabib<sup>120</sup>, Kedourie<sup>121</sup>, Ignatieff<sup>122</sup>, to name just a few, argue that nations are irrational historical fabrications made in Europe during the nineteenth century and they are based upon a set of “mental images”. These “mental images” support a doctrine which has a detrimental effect on the democratic stability of modern society. “[T]hey were writers and historians, and scholars and intellectuals in general, who laid the groundwork for Cavour’s and Bismarck’s subsequent diplomatic and military unification of the state by propagating the more or less imaginary unity of the ‘cultural nation’.”<sup>123</sup>

Habermas here refers to one of the first definitions of nationalism, which is - uncertainly - attributed to Herder. Herder argues that any state should have its own national population. “[A] population is a creation of nature”. His analysis, which is quoted by nationalists provides an account of the relation between cultural differences and a state’s political stability. Cultural differences between localised communities - and the transmission of these differences through generations - were analysed before,<sup>124</sup> however Herder provides an account of the detrimental effect of detaching the state from the

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<sup>119</sup> B. Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

<sup>120</sup> S. Benhabib, *Democracy and Difference : Contesting the Boundaries of the Political*, (Princeton, N.J.: Princeton University Press, 1996).

<sup>121</sup> Kedourie, Elie. 1960. *Nationalism*. Oxford: Hutchinson.

<sup>122</sup> M. Ignatieff, *The Warrior's Honor : Ethnic War and the Modern Conscience*, (London: Vintage, 1999).

<sup>123</sup> *Ibid.*, 105.

<sup>124</sup> At the time of the acme of the Muslim Empire, Ibn Kaldun, the man considered the father of anthropology, has studied the life and tradition of the Arab nations. This was before national community were even named.

sociological features of its population. To make his distinction clearer he compares the differences between the idea of empire and the idea of nation. The empire (*Reichnation*<sup>125</sup>) was the geographic area dominated by a state's administration." [T]he *unnatural state expansion is a mixture of human nations under a crown*".<sup>126</sup> In contrast with the empire, the nation (*Kulturnation*) is an extended community of people who are sharing the same idiom. The political implications of Herder's account are fully explained by Von Savigny. Von Savigny points out that it is "the web of relations" between people which underpins the political and administrative structure of the state - and ultimately binds the nation into one community -. He argues that this net of relations has two beneficial effects on modern politics. Firstly, it provides the legitimate support for the state. Next, it provides a criterion for dividing members of the national community from "aliens".

Cosmopolitans – such as Kedourie<sup>127</sup> - point out that Savigny's idea of connecting national cultural heritage with the state is irrational and it arises from a misunderstanding of the western philosophy which is based on Kantian canons.

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<sup>125</sup> The *Reichnation* included areas in which German is not the common idiom, yet the language of Goethe has been used in the Swiss *Eidgenossenschaft* (The Swiss Confederation), which is outside the *Reich*.

<sup>126</sup> J. G. v. Herder and B. Suphan, *Herders Sämmtliche Werke*, Weidmann, 1877). Zanichelli, Bologna. p.240

<sup>127</sup> E. Kedourie, *Nationalism*, (Oxford: Hutchinson, 1960). p.1



*“Nationalism is a doctrine invented in Europe at the beginning of the nineteenth century. [...] Briefly, the doctrine holds that humanity is naturally divided into nations, that nations are known by certain characteristics, which can be ascertained, and that the only legitimate type of government is national self-determination”.*<sup>128</sup>

He points out that the doctrine of nationalism is philosophically rooted in the Kantian idea of self-determination, but the chain of arguments - which transformed the hypotheses of the master of Königsberg into one of the most successful ideologies of our time - is based on misrepresentations and incoherencies. Kedourie explains that western philosophy is underpinned by the assumption that there is a linkage between individual freedom and morality. In a nutshell: a man is free, if he acts in accordance with a moral law. As a result of that assertion, it is a duty of every man to find a moral way of living. Kedourie argues that the search for the perfect morality became endless and, finally it was confused with the initial dogma; the free search of what is moral.

This confusion over the Kantian principle of self-determination gives nationalists the basis for demanding the right of self-determination of the nation. They argue that Kant's book "Critique of Pure Reason" is

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<sup>128</sup> Ibid.

affected by a serious limitation since the vision of morality which the text suggests is absolute but based on a subjective perspective. On their reading of the “Critique of Pure Reason”, they interpret the suggested continuum search for an ideal moral behaviour as an isolated individual activity. They argue that this search is a personal activity, which is open to personal and therefore relativistic interpretation. As a result, the absolute moral categorisation of Kant was paradoxically affected by absolute relativism. Kedourie shows how nationalists like Fichte provide the theoretical material for leaving behind the critique of Kant<sup>129</sup> - and pre-empting much of today’s communitarian literature - by changing the mindless individual into the encumbered member of the whole.<sup>130</sup> He explains that in Fichte, individuals cannot understand morality outside the society to which they are bound because it is only through society that a moral entity can pursue a moral life. It might seem logical to conclude that such a “whole” should embrace the entire humanity, not only national communities.

Kedourie pointed out how nationalism, in order to close the coherence of its reasoning, assumes that cultural diversity is part of an imagined God’s plan for stimulating humanity in its search for a perfect morality. Kedourie argues that this unfounded belief - of divine

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<sup>129</sup> “This is not say that Kant himself would have acquiesced to such uses to which his doctrine was put. He himself wrote specifically on political questions, he was an amalgam of audacity and timorousness, preaching at the same time strict obedience to the state and hinting also at view which could lead to the subversion of all settled authority.” Ibid. p.18.

<sup>130</sup> M. J. Sandel, Liberalism and the Limits of Justice, Cambridge University Press, 1982), C. Taylor, Hegel and Modern Society, (Cambridge: Cambridge University Press, 1979).

division of humanity - combined with a misinterpretation of Kantian philosophy is the ideological base of nationalism. When cosmopolitans, such as Habermas, propose their critique of the relation between nationhood and state, firstly they use Kedourie's critique of the rationality of nationalism, and then they focus on the effects which this irrationality has on the creation of a psychological linkage between an abstract notion – such as the idea of nation – and state. They point out that the stream of thoughts which nationalism brought was clearly in contrast with the premise it started from - since national movements have neither improved the moral standards, nor brought freedom, nor peace, instead they have made human relations bitter, democratic governments have been substituted by dictators and countries in which different ethnic groups were living peacefully were exploited by war.

Habermas argues that the set of mental images of nationalism can be ideologically exploited for supporting antidemocratic claims. He makes direct reference to the Nazi regime and to its xenophobic politics *"But this republican achievement is endangered when, conversely, the integrative force of the nation of citizens is considered something independent of - and prior to - the political."*<sup>131</sup> Ignatieff has recently proposed an even deeper analysis of the effect of the relationship between mental images created by the doctrine of

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<sup>131</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.115

nationalism and democratic risks.<sup>132</sup> He explains that all nationalistic claims are the irrational product of a psychological intolerance of minor cultural differences among similar groups.

*“A nationalist, in other words, takes “minor differences” – indifferent in themselves – and transforms them into major differences. For this purpose, traditions are invented; a glorious past is gilded and refurbished for public consumption, and people who might not have thought of themselves as people at all suddenly begin to dream of themselves as a nation.”*<sup>133</sup>

Ignatieff argues that the motivation, which makes nationalists think that a group might be superior to another, is based on a psychological difficulty to accept small differences among similar individuals. He uses the war in the Former Yugoslavia as metaphor of how this intolerance might degenerate into ethnic war. In the former Yugoslavia members of the same villages initially started to consider their neighbours strangers, then they began to see them as risks for their families, and finally friends and schoolfellows became animals that could be slaughtered. Ignatieff argues that there are no rational reasons that can explain this violent escalation. Genetic studies have provided enough evidence about the impossibility of differentiating

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<sup>132</sup> M. Ignatieff, *The Warrior's Honor : Ethnic War and the Modern Conscience*, (London: Vintage, 1999).p.34.

<sup>133</sup> Ibid.p. 51.

human beings on the base of their ethnic stock.<sup>134</sup> From the point of view of an external observer Bosnians, Croats, Serbians were sharing traditions, habits, and languages and in certain cases religion. Ignatieff explains that where differences were found they were so minimal that even anthropologists were unable to separate two different ethnic groups. However, these populations - which are so similar - were killing each other.

He argues that there is no real reason for this to happen apart from the suspension of rational judgment which results from the fact of being a member of a "national community".<sup>135</sup> Ignatieff claims that the motive of this massive disengagement from reality is the result of a psychological relation between narcissism and aggression, which Freud called "narcissism of minor differences".<sup>136</sup> Ignatieff concurs with Freud on the idea that the rational perception in which men are similar is unreasonably overshadowed by minor differences. These dissimilarities increase the level of group anxiety which might erupt in violence.

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<sup>134</sup> T. Nairn, *Faces of Nationalism : Janus Revisited*, (London: Verso, 1997).

<sup>135</sup> M. Ignatieff, *The Warrior's Honor : Ethnic War and the Modern Conscience*, (London: Vintage, 1999). p. 38.

<sup>136</sup> S. Freud, et al., *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, (London: Hogarth Press and the Institute of Psycho-analysis, 1966). "The Taboo of Virginity".

*“Moreover, what looks like a minor difference, when seen from the outside, may feel like a major difference when seen from the inside. Freud’s distinction [...] helps us to see that the level of hostility and intolerance between groups bears no relation to the size of their cultural, historical, or physical differences as measured by a dispassionate outside observer.”<sup>137</sup>*

Ignatieff asserts that nationalism and ethnic hate are growing from the psychological displeasure of minute differences upon which the idea of nation is built. Nationalism - Ignatieff argues – can only be understood as an extreme form of narcissism in which the less substantial the differences between human groups are, the more hostile they are likely to be toward each other. He suggests that initially these minor characteristics provide the base for fabricating myths and traditions, then these cultural aspects are quoted in order to create more differences and the entire process becomes self-sustained. He concludes saying that nationalism is not a revival of old historical rivalries but a sophisticated hoax in which details without significance are conveyed into a chain of reasoning which should transform irrational claims – such as the right of excluding others from the

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<sup>137</sup> M. Ignatieff, *The Warrior's Honor : Ethnic War and the Modern Conscience*, (London: Vintage, 1999).p.50



political community - into legitimate demands. Like Habermas, Ignatieff argues that the logical solution to the risks associated with the traditional form of the nation-state is to renounce this irrational ambivalence<sup>138</sup> and exclude nationalism from the political arena.

Habermas asserts that a possible alternative to this reconstruction of the irrational nation-state is its transformation into a supranational or non-nation-state. '[W]e can take our orientation on the precarious path toward post-national societies from the very historical model we are on the point of superseding.'<sup>139</sup> Habermas claims that the model of national social cohesion, which must bind citizens who are strangers to one another, is not something given by the community but rather it springs from an individual commitment to the universal values extracted from a rational reading of democratic constitution making.<sup>140</sup>

## 2. THE THEORETICAL RELATIVISM OF COSMOPOLITANISM

Cosmopolitans – such as Habermas - argue that it is irrational to consider national identity as a pre-political element of modern society. He explains that nationalism is an irrational belief, which can be politically manipulated, and it can endanger democratic values. Notwithstanding these critiques, nationalism has maintained its political appeal and it has extended - at least in Europe - its political

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<sup>138</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27. p.111

<sup>139</sup> Ibid.in ed/s p. 107

<sup>140</sup> Critics of Ignatieff and Habermas, such as Kymlicka and Canovan, argue that they, in fact, elevate certain state nationalisms over others. This interpretation of Habermas is based on the idea that nationalism permeated any form of possible political association. This assumption is normatively unfounded and historically debatable (see chapter 1).

claims with the creation of new national movements (e.g. Austria, France, Italy, and UK). A reason for this European failure to convince public opinion on the possible political danger of nationalism might be strategic; nationalistic propaganda can easily link unrelated sociological situations such as unemployment with the increase of asylum seeking demands and individuals can assimilate nationalism as a protection of their own private interests. Theoretically this is a trivial point but if we assume that a democratic arena is the place in which political demands are put under a rational scrutiny, and if we assume that nationalism is an ideology based on a set of irrational beliefs, why does nationalism increase its political weight in Europe? If we adopt Habermas' and Ignatieff's ideas, we should accept that given the right input, masses reject rationality and endorse imaginary beliefs. This tendency – which seems innate in modern society – must be stopped by the exclusion of nationalism from modern democracy. He claims that the irrationality of nationalism has historically affected the common perception of the relationship between individual identity and the constitutional state.

*“[T]he allegedly paradoxical relation  
between democracy and the rules of law  
resolves itself in the dimension of historical  
time.”<sup>141</sup>*

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<sup>141</sup> J. Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" Political Theory 29/6 (2001), 766-81p.768

However, the history of democratic instability of the nation-state, in comparison with the relative steadiness of multi-ethnic constitutional democracies – such as the one of the United States of America -<sup>142</sup> is due to the irrational basis of nationalism and this justifies its aprioristic exclusion from a modern democratic state.

*“The history of European Imperialism between 1871 and 1914, and nationalism [...] (not to speak of the racist policies of the Nazis), illustrate the sad fact that an idea of nation did not so much reinforce the loyalty of the population to the constitutional state, but more often served as an instrument to mobilise masses for political goals that can scarcely be reconciled with republican principles.”*<sup>143</sup>

Nationalists suggest that there is a connection between individual autonomy, democracy, and national self-determination, but a rational reading of the evolution of the relationship between nationalism and state reveals – Habermas argues – that the idea of national identity is an irrational political concept which endangers the republican values protected in modern constitutional democracy.

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<sup>142</sup> Habermas makes no references here to the US civil war. We will discuss the selectiveness of Habermas in the following paragraphs.

<sup>143</sup> J. Habermas, “The European Nation State: On the Past and Future of Sovereignty and Citizenship”, in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27. p. 111.

However, if we accept that nationalists cannot use historical arguments to support substantive claims, neither should cosmopolitans – such as Habermas – be in the position to argue that an historical analysis of modern constitution making sustains a barring of nationalism. As we explained in the previous chapter, the reason for this impossibility has to do with the nature of the relationship between theoretical claims and history. Given the unavoidability of the relativism, which affects any historical analysis, it is impossible to support procedural - or substantial - theoretical claims. The relativistic nature of Habermas' claims is made more obvious by a plethora of studies on the origins and sociological functions of nationalism which link national identity to sociological features of modern society (such as Smith).<sup>144</sup> These accounts support a nationalistic political theory – such as the one of Miller or MacCormick – which wants to protect the role of national identity in modern democracy.<sup>145</sup>

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<sup>144</sup> A. D. Smith, Theories of Nationalism, (London: Duckworth, 1971), J. E. Smith, Quasi-Religions : Humanism, Marxism, and Nationalism, (New York: St. Martin's Press, 1994), A. D. Smith, Ethnicity and Nationalism, (Leiden ; New York: E.J. Brill, 1992).

<sup>145</sup> I cannot stress enough that this thesis does not support either of the approaches – the one which denies and the one which advocates a substantive relationship between nationalism and state -. These analyses are proposed here only to make clear the relativism of Habermas' proposal. I argue that it is democratically incoherent to adopt any of these interpretations as factual elements for supporting an alternative model of constitutional democracy. I will make clear later in this thesis that these proposals confuse the reasons, which support a political claim – like a demand of protecting or ignoring the national identity – with a proposal which supports the adoption of an alternative template of constitutional democracy. I argue that any political claim can be matter of discussion in a political debate, but a proposal of new template of constitutional democracy cannot impose the finding of a sociological analysis for limiting the political arena without being considered democratically incoherent. This debate which includes the question of linking democracy to social claims will be the theme of the following chapters.

A) SMITH'S SOCIOLOGICAL ANALYSIS OF THE RELATION BETWEEN  
ETHNICITY AND MODERNITY.

Liberal nationalists and civic nationalists – such as MacCormick<sup>146</sup> and Smith<sup>147</sup> - argue that a possible constitutional protection of individual or community rights is not based on its rational coherence but upon its compatibility with modern pluralistic democracies. MacCormick argues that the sociological context, which surrounds individuals in modern society, constitutes an asset that should be protected as an individual's right.<sup>148</sup> This context is constituted by an ensemble of sociological features which they consider essential aspects of a national identity. This aspect is not challenged by cosmopolitans – such as Habermas<sup>149</sup> and Ignatieff,<sup>150</sup> - but they argue that nationalism is a factual aspect of modernity which might endanger republican values. In contrast with what Habermas suggests,<sup>151</sup> sociologists like Smith<sup>152</sup> concur with MacCormick<sup>153</sup> on the fact that nationalism is an axiological aspect of modern society which might be protected as any other individual's right. Smith shows how the pure theoretical

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<sup>146</sup> N. MacCormick, Questioning Sovereignty Law, State and Nation in the European Commonwealth, (Oxford: Oxford University Press, 1999). pp. 176-191.

<sup>147</sup> A. D. Smith, Theories of Nationalism, (London: Duckworth, 1971).pp. 186 and successive.

<sup>148</sup> N. MacCormick, Questioning Sovereignty Law, State and Nation in the European Commonwealth, (Oxford: Oxford University Press, 1999).p.176.

<sup>149</sup> J. Habermas, et al., The Inclusion of the Other : Studies in Political Theory, (Cambridge: Polity, 1999).p.111

<sup>150</sup> M. Ignatieff, The Warrior's Honor : Ethnic War and the Modern Conscience, (London: Vintage, 1999).p.150

<sup>151</sup> J. Habermas, et al., The Inclusion of the Other : Studies in Political Theory, (Cambridge: Polity, 1999).p.111

<sup>152</sup> A. D. Smith, Theories of Nationalism, (London: Duckworth, 1971).p. 86.

<sup>153</sup> N. MacCormick, Questioning Sovereignty Law, State and Nation in the European Commonwealth, (Oxford: Oxford University Press, 1999).p.176.



analyses of nationalism – such as the one proposed by Kedourie and embraced by Habermas - has brought little light to the template which supports the idea of national identity. They try to reduce nationalism to a narrow paradigm such as language difference (e.g. Anderson<sup>154</sup>) or a subjective historical analysis (e.g. Kedourie<sup>155</sup>), which is not enough to make a working model of a social movement. Smith explains that language theories reduce the phenomenon of nationalism to a small number of social variables (language, modernisation, social transformation, and “social anomie”), which permit the elaboration of a reasonably simple paradigm. Then, they do not use the paradigm as a test-bed for verifying the correspondence between the model and the social phenomenon, but they confound this tenet with the social phenomenon itself.<sup>156</sup>

To make this point clearer, let us go back to Ignatieff’s analysis of the effect of nationalism on the ethnic war between Serbs and Croats.<sup>157</sup> On his reading of the chain of events which led to civil war in the former Yugoslavia, Ignatieff starts from the presupposition that there are not major anthropological differences between Serbs and Croats. Next, given that the two groups are similar, he looks for a different criterion for separating the two ethnic communities. He suggests - in analogy with the work of Anderson on imagined communities - that

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<sup>154</sup> B. Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

<sup>155</sup> E. Kedourie, *Nationalism*, (Oxford: Hutchinson, 1960).

<sup>156</sup> A. D. Smith, *Theories of Nationalism*, (London: Duckworth, 1971).p. 86.

<sup>157</sup> M. Ignatieff, *The Warrior's Honor : Ethnic War and the Modern Conscience*, (London: Vintage, 1999).



the division between the two communities is not factual but psychological. To support this claim Ignatieff directly refers to a hypothesis elaborated by Freud in which the hate between individuals is motivated by the intolerance of minute psychological discrepancies between characters. Freud names the motivation for this hate: "narcissisms of minor differences". Apart from the obvious critiques that there are few tests which confirm this hypothesis and the fact that Freud was not referring to group dissimilarities, but to individual differences, Ignatieff seems to reproduce (tautologically) his presuppositions on his conclusion. He asserts there are no rational reasons for the war in the Former-Yugoslavia since there are no differences between Serbs and Croats.

In contrast with this idea, Smith explains how these methodological analyses of the relationship between nation and politics are based on an unreasonable limitation of the sociological phenomenon, they claim to study.

*“Nationalists have not spilt their blood [...] they have not expended their energy and lives, to forward the cause of the language or, even the culture [...] The ideal of nationhood, which has stirred these men and women, is more complex, less earthy, yet more compelling and powerful. It is an ideal of a different order altogether.”*<sup>158</sup>

Smith agrees with Anderson and Kedourie that nationalism is an ideological belief but he adds that its doctrine provides more than a simple and straightforward link between generations. He points out a series of systematic distinctions which are needed to distinguish nationalistic features from other aspects of modern society. The first of these distinctions is the separation between what the author calls ideological ethnocentric and polycentric nationalism. *“For an ‘ethnocentric’ nationalist both power and values inhere in his cultural group [...] my group is the vessel of wisdom, beauty, holiness, and culture; hence power automatically belongs to my group.”*<sup>159</sup> An example of this form of ideological nationalism is the one that afflicted the former Yugoslavia during the war in Bosnia.<sup>160</sup> Smith suggests that this form of nationalism contains the general characteristics of the ancient and mediaeval communities, which claim that there is a linkage between the national group and divinity.

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<sup>158</sup> A. D. Smith, *Theories of Nationalism*, (London: Duckworth, 1971).p.150

<sup>159</sup> Ibid.p158

<sup>160</sup> See M. Ignatieff, *Blood & Belonging : Journeys into the New Nationalism*, (London: Vintage, 1994).

In contrast, the second variety of nationalism considers a nation as an ensemble of different groups. This kind of “polycentric”<sup>161</sup> nationalism perceives the existence of other nationalities as equal, and it tries to join different nations in a family of nations. This last form of nationalism appeared after the French revolution and it is related to a theoretical mutation on the sociological nature of nationalism. Polycentric nationalism – which Smith associates with modern democratic nationalism - has three features which differentiate this sociological phenomenon from the old ethnocentric nationalism. Firstly, modern nationalism is an autonomous political movement which does not need to link itself to divinity – as ethnocentric nationalism does - to demand the protection of its political rights. Secondly, it claims that each nation has its own peculiar sociological characteristics. The protection of these cultural features provides the theoretical reason which supports its political claims. Given that these sociological aspects are different, different nations have different claims. Thirdly, modern nationalism recognises the existence of equal rights among different nations. Smith explains that the acknowledgment of the existence of other groups with their own claims makes modern nationalism respectful of pluralism. He argues that polycentric nationalism supports an idea of world order in which liberty depends on the realisation of nation-states, each of which gives

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<sup>161</sup> A. D. Smith, Theories of Nationalism, (London: Duckworth, 1971).p.158

own contribution to humanity by expressing its own cultural character in a state of its own <sup>162</sup>.

Smith suggests that the three features of polycentric nationalism - autonomy, individuality and pluralism - converge on a single definition of nationalism. "*Define 'nationalism' as an ideological movement, for the attainment and maintenance of self-government.*"<sup>163</sup>

He asserts that this definition describes two different aspects of ideological nationalism; the first is related to those groups, which are not yet a nation, but which are struggling to obtain their right of self-determination and the second is tied to an image of nationhood. These two aspects of nationalism are connected to the two different dynamics used by national movements for developing a modern society. Nationalism may start as a claim of independence, and then it might develop the other elements of polycentric nationalism (e.g. the regional movements in Britain, Belgium, etc.) or it could be related to a nation-state, which has already all the essential elements of the doctrine of nationalism (e.g. national movements in Austria, France, Italy etc.). These forms of ideological nationalism - Smith here explains - should be distinguished from sociological features of nationalism which are:

- i. *Cultural differentiae*
- ii. *Territorial contiguity with free mobility throughout*
- iii. *A relatively large population*

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<sup>162</sup> Ibid.p. 171

<sup>163</sup> Ibid.p. 171

- iv. *External political relations [...]*
- v. *Considerable group sentiment and loyalty*
- vi. *Direct membership with equal citizenship rights*
- vii. *Vertical economic integration around a common system of labour.*<sup>164</sup>

The first two of these features - cultural *differentiae* and territorial continuity – are the criteria which are used by members of a tribe to distinguish themselves from other tribes. These two aspects represent the basic elements of modern nationalism and they should be considered its anthropological foundations. The sociological evolution of human communities adds to these two elements another three features. Firstly, the tribe included other tribes and transformed itself into a new sociological entity. Secondly, the newly formed community was based on a net of internal relations which created the conditions for external political relations with other similar groups. Thirdly, the historical relation between different tribes reinforced the sentiment of loyalty between members of the same sociological group. Smith explains that the combination of these three aspects - enlargement of the tribes, reinforcement of the sentiment of loyalty between different tribes, and a policy of external relation between different groups - distinguished the sociological structure of the tribe from the kingdom which include a multitude of tribes in one country. However, polycentric nationalism – which he considers the theoretical template of modern nationalism - can be found only in a society,

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<sup>164</sup> Ibid. p.186

which has “*direct membership with equal citizenship rights*” and “*vertical economic integration around a common system of labour.*” These last sociological aspects distinguish the ethnocentric model of nationalism, such as the one adopted by the Serbian regime during the War in the Former Yugoslavia, from the polycentric nationalism which recognises the right of demanding the protection of their community’s rights. Legal theorists, such as MacCormick,<sup>165</sup> Miller,<sup>166</sup> Tamir,<sup>167</sup> etc., refer to Smith sociological conclusion for demanding a legal protection of national cultural heritage and for supporting the right of self-determination of the nation. This last claim – they argue – is a functional requirement of the legal protection of national cultural characteristics. They explain that in a democratic society which relies on the majority will for making legitimate statutes, the only absolute guarantee for the protection of national cultural identity is the independence of the national communities. In the last chapter I will defend a similar conclusion, but I will explain that the reasons which support the legitimacy demand of unilateral secession are independent from the values of predetermined social features.<sup>168</sup> I will deal with this issue later (chapter 6), let us continue our analysis on the relativistic nature of Habermas’ assessment of the rationality of nationalism.

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<sup>165</sup> MacCormick, N. “What Place for Nationalism in the Modern World?” National rights and international obligations. Eds. S. Caney, D. George and P. Jones. Newcastle-upon-Tyne: Westviwe Press, 1995. 34-52.

<sup>166</sup> D. Miller, On Nationality, (Oxford: Clarendon Press, 1995), D. Miller, “Nationality in Divided Societies”, in ed/s A.-G. Gagon, Multinational Democracies}, (Cambridge: Cambridge University Press, 2001), 299-19.p 299-219.

<sup>167</sup> Y. Tamir, Liberal Nationalism, (Princeton: Princeton University Press, 1993).



In addition to sociological analyses, such as the one proposed by Smith, anthropologists like Gellner<sup>169</sup> suggest the existence of a substantive link between language and nationalism. He argues that nationalism is a consequence of the fact that modern society needs constant communication between classes.<sup>170</sup> This transformation, which happened during the Eighteenth century, has mutated nationalism from a romantic concept into an instrument of homogenisation which imposes standards of communication within determinate communities. With this idea, Gellner proposes his critical analysis of the relation between language and nation making.<sup>171</sup>

Before going onto the details of Gellner's anthropological account of the relation between nationalism and communication, it might be useful to point out that he does not support a substantive relation between democracy and nationalism, nor does he argue the rational validity of ethnic claims. Instead, the focus of his analysis is on the factual relation between modernisation and development of nationalism as a social phenomenon. However, his examination of the relationship between language and the development of national identity is indirectly used to support theoretical claims like the protection of the national language. Gellner argues that during

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<sup>169</sup> E. Gellner, Nations and Nationalism, (Oxford: Basil Blackwell, 1983).

<sup>170</sup> Ibid.p.32.

<sup>171</sup> The existence of this connection between idiom and national identity is used by theorists like Grimm for claiming a linkage between democracy and language

industrialisation, modern states developed a programme which promote massive language homogenisation. *“For the first time in human history, explicit and reasonably precise communication becomes generally pervasively used and important.”*<sup>172</sup> The main effect of nationalism on modernity is the creation of anonymous masses which understand each other even outside the small circle of relatives and friends. He explains that this had a double impact on the internal relation between individuals who were not sharing anything apart from being arbitrarily included on the same state’s borders. Firstly, citizens became accustomed to the use of a common standard alphabet and the same language. Secondly, they started to behave as if they were sharing a common identity. Gellner argues that nationalism acts on modern society as an imagined communication facility which holds symbols, customs, and operative preferences, which provides a standard language, and a system of auxiliary codes such as an alphabet, a writing style, a calculation system and the institutions entitled to keep, interpret and transmit the cultural asset of the national community.

This model of nationalism helps to understand the relation between national groups which share the same geographical area (e.g. Flemish and Walloon communities in Belgium; Serbs and Croats in the former Yugoslavia, the two communities in Northern Ireland). Gellner argues that the homogenisation effect of nationalism is untangled from

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<sup>172</sup> Ibid., p.33

geopolitical borders and therefore the development of a national identity is often unrelated to the state's administrative system. In contrast with Ignatieff, Gellner explains that two national communities are clearly distinguished if they are considered in their ideal cultural centre, and then the differences slowly become less evident as our point of observation moves from the ideal centre of one, to the core of another.

To make this point clearer, we can metaphorically consider the cultural effect of two national identities interwoven into the same geographical area as the circle of rings made by two stones dropping on the same pool;<sup>173</sup> the distinction between the effects of the two stones is obvious only if the point of view is above the pool not within the waves. When two or more national communities are mixed, members prefer - Gellner argues - to interact with subjects sharing the same national identity, since the external interaction between nationalities is less efficient than the internal communication between members of the same nationality. On the one hand, members who share a particular background of information (symbols, customs, and operative preferences which provide a standard language, and a system of auxiliary codes such as an alphabet, a writing style, a calculation system) interact more efficiently since there is no need to transmit this information to the members of the same group. On the

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<sup>173</sup> The centres of the two are clearly visible, but the areas covered by the two series of waves overlap. Often, communities, who live at the borders of two distinct spheres of influence make up their own identity. We have several examples of these cases on areas which have been contested between two well-formed nationalities for centuries. e.g. the Scottish Borders, the South Tyrol, and soon and soon.

other hand, the interaction with a subject who belongs to a different nationality is more difficult since they must transmit - in addition to the message - all the material for understanding the meaning of the communication. This makes the interaction difficult and stretches the risk of misunderstanding. Gellner suggests that due to these disadvantages, there is less interaction between strangers and members and this finally stimulates the uniformity and xenophobia of national groups.

This idea of a strong link between nationalism and wide social communication - which is a peculiar element of modern society - provided the theoretical ground for claiming a constitutional differentiation between different ethnic groups.<sup>174</sup> However this claim is easy to prove in the case in which different national groups are speaking two different languages (*e.g.* Dutch and French speakers in Belgium). Less obvious is the case in which the language is not the reason for supporting a single national identity (*e.g.* Switzerland). Gellner argues that in this case other features, which are all related to communication, are relevant to understand the divisions between people who are speaking the same idiom. He argues that a national identity is a 'communication utility', which can link communities which speak different languages, such as Switzerland, and divide groups which speak the same idiom, such as Germany and Austria -.

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<sup>174</sup> D. Arel, "Political Stability in Multinational Democracies." in ed/s J. T. Alain-G. Ganon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 65 - 89.p. 65 – 79.

To clarify this point we can make an analogy between the cultural effect of nationalism and religion.<sup>175</sup> Gellner argues that the concept of nationalism is an ensemble system of medias. Similar to nationalism, the three major monotheist religions use a holy book (Koran, Bible, and the New Testament) as the medium for transmitting and preserving their customs and traditions. The holy book is a communication facility, functionally similar to the national cultural heritage, which gives to the believers an alphabet with a complete range of communication utilities, a list of simple metaphorical symbols, and a description of simple moral behaviours. The fact that not all believers can read or understand the language used by their holy books does not limit the communication between members of the same faith, since the range of rituals and metaphorical symbols described in the book, manages to across linguistic and sociological barriers. This idea of getting over the language barrier makes mutual understanding possible for members of the same faith, even if they are not sharing the same idiom.

#### C) LIBERAL NATIONALISM AND ITS LEGAL CLAIMS

Gellner's critical account of the relation between nationalism and modernity and Smith's explanation of the effect of nationalism on society, directly contradict the historical reconstructions proposed by

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<sup>175</sup> It is not on the aim of this chapter to support a parallelism between religion and nationalism, the example I propose here is only to clarify how a common cultural elements might works as a code of communication in a context in which people do no share the same language. I will say more about the connection – or the lack of it – between religion and nationalism on the next chapter.



Habermas and they provide argumentative material for supporting the protection of national identity. For example, Smith's study of the relation between social texture and national identity is quoted by Weiler<sup>176</sup> when he speaks about the constitutional protection of national identity. Also, Grimm<sup>177</sup> argues that there is a substantive linkage between language and national sovereignty. "*Here, then, is the biggest obstacle to Europeanization of the [national] political substructure, on which the functioning of a democratic system and the performance of a parliament depend: language.*"<sup>178</sup>

This linkage between sociological studies and political theory is even more evident in the proposals of liberal nationalists such as MacCormick<sup>179</sup>, Patten<sup>180</sup> or Tamir.<sup>181</sup> They assert that the individual and group sense of freedom, which democracy provides, needs a sense of loyalty to collective decisions. This acceptance of communal choices is possible only if democracy takes into account the individual self-realisation which depends on a substantial degree of support from economical and social backing. From this assumption, MacCormick

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<sup>176</sup> J. H. H. Weiler, *The Constitution of Europe : "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999).

<sup>177</sup> D. Grimm, "Does Europe Need a Constitution?" *European Law Journal* 1/3 (1995), 282-302

<sup>178</sup> Ibid. p.295 My emphasis

<sup>179</sup> MacCormick, Neil. *Questioning Sovereignty Law, State and Nation in the European Commonwealth*. Oxford: Oxford University Press, 1999.

<sup>180</sup> A. Patten, "Liberal Citizenship in Multicultural Societies", in ed/s J. Tully, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001),

<sup>181</sup> Y. Tamir, *Liberal Nationalism*, (Princeton: Princeton University Press, 1993).



argues that the collective sense of belonging which supports democracy should be considered an individual right of its members.<sup>182</sup>

*"The assertion of national aspirations does not have to be, and rationally ought not to be, a ground for denial of other aspirations of a similar kind. This is a principle which can and should be recognised among the principles of right (or justice) that set the terms of shared democracy in a large-scale confederal commonwealth like the European Community."*<sup>183</sup>

The idea of nation-state, which MacCormick<sup>184</sup> suggests here, is compatible with the reduction of state sovereignty, but it is not clear if it is compatible with the basic rules of the democratic regime. To preempt this critique, he argues that democracy requires a sense of loyalty to collective decisions and nationalism is among the sociological aspects – but not the only one - which contribute to make these choices a shared element within a particular community.<sup>185</sup> These choices – in the context of democratic decision-making – are a factor which helps the implementation of the European principle of subsidiarity

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<sup>182</sup> N. MacCormick, Questioning Sovereignty Law, State and Nation in the European Commonwealth, (Oxford: Oxford University Press, 1999), p.176

<sup>183</sup> Ibid. p.191

<sup>184</sup> Ibid.

<sup>185</sup> N. MacCormick, Questioning Sovereignty Law, State and Nation in the European Commonwealth, (Oxford: Oxford University Press, 1999), p.167

*"Old conceptions of state-sovereignty and of the absolutism of the nation-state are in the process of being transcended, and will perhaps be completely transcended, if people realise that this is possible and in certain important ways desirable. The process does not abolish nations as political-cultural communities. It may create space for the flourishing of nations and, in a significantly qualified sense, of nationalism."*<sup>186</sup>

MacCormick argues that nationalism links together institutions (regional, national and European) and cultural aspects, such as religion, languages, cultural heritage. This combines the demand for protection of national cultural characteristics, which are generally associated with European ethnic nationalism, with civic nationalism, which supports constitutional democracies such as USA. He suggests that nationalistic claims are on the middle ground between the protection of cultural heritage and the protection of the values of a civic society. In a contest in which all democracies are nationalistic, the protection of national identity moves the balance between the respect of multiculturalism and the promotion of nationalism. He points out that pragmatically, some countries might move their internal policies close to the limit of the two axioms: republican values and nationalism. However, MacCormick suggests that: "*it is*

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<sup>186</sup> Ibid.p.167.

*the common culture that prevails*".<sup>187</sup> He asserts that whereas civic nationalism reads nationalism as a shared agreement between institutions and national community, ethnic nationalism considers nationalism as a matter of belonging. However, the two ideas of nationalism are not exclusive. Ethnic communities can make their own institutions, and civic commitment might create a sense of belonging to the community, in which this loyalty is shared.

Nationalism is not a homogenising force, which only wants the preservation of its own cultural features without recognition, but it is a political movement which claims the right of national self-determination for preserving cultural diversity. This distinction between protection of cultural diversity and freedom for the national community might be pragmatically possible,<sup>188</sup> but the problem of the compatibility of the right of national self-determination with democracy remains. If the national community has the right of self-determination, how could we justify the exclusion of one who is not a member of the national community, from the right to determine his/her life within the community s/he lives?

MacCormick argues that the right of self-determination is a universal requirement of liberal democracy, but it should be understood in a logical sense. This means that when a political community grants to an

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<sup>187</sup> Ibid.p.169

<sup>188</sup> This is a 'hot' issue in MacCormick. The problem, here, has to do with the assumption that a national community wants to preserve its cultural characteristics in a multicultural society. How this might be achieved without effectively reducing multiculturalism is open to discussion. In this thesis I argue that the only democratic way to protect multinationalism – and in it I include national cultural diversity – is by recognising multinational nature of modern society and leaving the democratic debate to decide.

individual the right of participating in the democratic process, it automatically makes the outcomes of this procedure part of his/her political decision. However, it is possible to restrain this right to a certain category of individuals if these restrictions are logically justifiable. For example, we can assume that rules such as “all males with black skin have the right to vote” would be more difficult to substantiate than “all citizens over eighteen have the right to vote”. The ground for exclusion of under eighteens is the territorial linkage between government, citizens and political adulthood. However, it would be impossible to find a logical linkage between “black skin requirement” and political maturity. The possibility of limiting the extension of the right to vote to certain categories of people – liberal nationalists argue - means that the principle of individual self-determination is logically connected to the social context. *“It is clearly not possible to understand humans as extrinsically extra-social atoms who come together voluntarily or otherwise to form human societies or communities, in the manner envisaged by contractarian thought.”*<sup>189</sup> The right of individual self-determination, MacCormick argues, is in a dynamic relation with the social context. The national community critically affects the social context, therefore the right of national identity should be considered as a fundamental aspect on the construction of liberal society.

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<sup>189</sup> N. MacCormick, Questioning Sovereignty Law, State and Nation in the European Commonwealth, (Oxford: Oxford University Press, 1999). p. 176

The merit of this idea of nationalism is to promote the individual sense of national identity into the European project<sup>190</sup> which has to balance cultural aspects and national institutions. MacCormick argues that the European Union represents an opportunity for making a new political order - a Commonwealth - which transcends the traditional idea of a sovereign state that is already weakened by the guarantee of free movement of people, goods and services. This proposal seems to have taken root in the European political debate which has moved from an idealistic, economically driven super-nation-state to a net of infra-nation-states.

### 3. THEORETICAL RELATIVISM AND THE ROLE OF NATIONALISM IN MODERN DEMOCRACY

Comparing MacCormick's work with Habermas' hypothesis, we saw that they are both perfect examples of the relativism of using a sociological analysis for supporting an alternative model of the nation-state. The methodology of the two analyses is similar. Both authors start from a non political account of nationalism, Habermas uses Kedourie and MacCormick adopts Smith's idea of nationalism as a social context. They then use these accounts for explaining the role of nationalism in modern constitutional democracies; finally they suggest some adjustments of the template of modern state which wants to

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<sup>190</sup> Ibid.p.189 See also: J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35, J. H. H. Weiler, "The Promised Constitutional Land." Kings College Law Journal 12/1 (2001), 5-16



preserve the democratic stability of a community. However, one of the two studies supports the normative roles of nationalism on modern democracy and the other denies it.

Cosmopolitans, such as Habermas assert that the nation-state is the result of the transformation of the tyrannical *ancien régime* into a capitalistic society during the modern era. He claims that although the concept of the nation pre-dated the one of state, they have subsequently fused into the nation-state and provide an irrational psychological cover for the conceptual gap of the constitutional state. However, sociologists, such as Smith, and anthropologists, such as Gellner, contest Habermas' historical account of the relation between nationalism and modern society. Historians dispute even the last point of Habermas' historical analysis in which he claims that nationalism became allied with anti-Semitism. Historians, such as E. J. Hobsbawm, - hardly a revisionist of the history of the Third Reich, points out the common mistake of confusing nationalism with fascism.<sup>191</sup>

The plethora of studies on the role of nationalism in modern society supports different political models which directly rebut the cosmopolitan idea of a constitutional democracy. The comparison between these theoretical models – and here I repeat myself – is not to support, or to deny, a normative relation between nationalism and

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<sup>191</sup> E. J. Hobsbawm, *Age of Extremes : The Short Twentieth Century 1914-1991*, (Michael Joseph, 1994) See also: E. J. Hobsbawm, *Nations and Nationalism since 1780 : Programme, Myth, Reality*, (Cambridge: Cambridge University Press, 1990).



democracy, but to point out the subjectivity of a cosmopolitan critique of nationalism. The reason for this relativism has to do with the nature of the relationship between political model, democracy, sociology, and history. The decision of what is rationally acceptable is a prerogative of the democratic debate. Thus, cosmopolitanism cannot construct a theory of democracy which seeks a procedure to support legal decisions with a universal rationality, and then use a *subjective* historical analysis to demand the exclusion of political entities of the political arena. I suggest that the task of finding out if nationalistic claims are rational is democratic practices which should be left to the political arena and that the aprioristic constitutional ruling out of nationalism from modern states – as demanded by cosmopolitans – eschews democracy. Instead, I will suggest that a theoretical model of the relation between nation and democracy cannot aprioristically set a criterion of evaluation of political claims without breaking the linkage between people (*demos*) and norms (*leges*). The details of this point will be discussed in the next chapter.

## CHAPTER 3

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### THE DEBATE OVER THE RELATIONSHIP BETWEEN DEMOCRACY AND NATIONALISM

#### 1. CONSTITUTIONAL PATRIOTISM: INTERNAL INCOHERENCE AND DEMOCRATIC RISKS

In the first chapter, I made clear that there are not relationships between the debate over the historical origins of nationalism and the debate over its compatibility with the evolution of modern states. In chapter 2, I continued this process of reducing the number of studies relevant to the debate over the role of nationalism in modern democracy. I explained that the discussion over the rational – or irrational - basis of nationalism might provide supporting reasons for a political claim, but it cannot support a political theory which wants the aprioristic exclusion of nationalism – like Habermas suggests - or underpins substantive relationship between nation and state. In this chapter we will discuss if there are normative reasons which support the role of nationalism in the democratic process. I might anticipate that in the following chapters, I ultimately suggest that nationalism and its claims contribute to the process which links *demos* to the legal system, but before arriving to discuss this assertion I have to explain why present day legal theorists fail to understand the normative implications of this point.

As I said before, Habermas and Ignatieff argue – such as many cosmopolitans - that a substantive and direct relationship between the idea of a homogeneous national-population and state is normatively unsupported and demands the ruling out of nationalism from the template of modern constitutional democracy. Cosmopolitans - such as Habermas - do not make any distinction between civic and ethnic nationalism. They argue that nationalism is irrational since it claims the existence of a linkage between unrelated historical events, and it is democratically dangerous since this imagined connection creates a psychological belief which can be politically manipulated for implementing a policy of ethnic and racial persecution against minorities. *“The positive self-understanding of one’s own nation now becomes an efficient mechanism for repudiating everything regarded as foreign, for devaluing other nations, and for excluding national, ethnic, and religious minorities, especially Jews.”*<sup>192</sup> However, Habermas is aware that this argument might support a dismissal of nationalistic political demands – which might be discussed within the political arena - not a ruling out of nationalism from modern democracy. Many religious minorities and ethnic groups - which Habermas wants to protect from nationalism - demand the implementation of policies which are no less irrational and antidemocratic. To distinguish these political stances from nationalists

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<sup>192</sup> J. Habermas, *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy*, (Cambridge: Polity Press, 1996).p.111.

he argues that the incompatibility of nationalism with democracy is a procedural element of modern constitutional democracy.

On this chapter, I will discuss how Habermas tries to support this point. In his hypothesis of a patriotic state he demands the ruling out of nationalism from modern democracy. However, this attempt to solve the problematic relation between democracy and social integration pre-empts the aims of a deliberative democracy and inserts an *a priori* dismissal of all substantive claims related to national particularities from his theorisation of the patriotic state. I will point out that not only Habermas' exclusion of nationalism is incompatible with the theoretical bases upon which he built his theory, but more importantly it is at the expense of the democratic coherence of modern society. The review of Habermas' patriotism should make clear the limits of a theoretical analysis of the relationship between democracy and nationalism – which is the core of cosmopolitanism -, and will provide a spring board for the next chapters, where I will attempt – with the help of Tully's idea of multinationalism -<sup>193</sup> to propose my solution to the problematic relationship between constitutional democracy and national identities.

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<sup>193</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995), M. Keating, "So Many Nations, So Few States: Territory and Nationalism in the Global Era", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 39-65.

## A) THE EXCLUSION OF ANTIDEMOCRATIC CLAIMS FROM A LIBERAL DEMOCRACY

Obviously, a community might rule out political movements - such as religious extremism, fascism, etc. – since they challenge the very existence of democracy. In liberal states, the theoretical procedure which leads to the ruling out of these movements is relatively straightforward. Firstly, there is a substantive evaluation of the compatibility of these political entities with a hypothetical set of democratic values, which are embedded in liberal societies. Secondly, if political claims supported by these movements are considered “democratically intolerable” the exclusion might be inserted into the legal system either by a decision adopted by a legislative body or by the judicial entity – such as a constitutional court -. Let me pursue this through with an example. If a neo-fascist party proposes a draft bill which prevents all people with black skin from accessing educational institutions, the legislative assembly evaluates the effect of such a bill on a democratic society and has the option of either refusing its approval or accepting it as part of the legislative system. If the proposals were accepted, the blatant violation of basic liberal principles should be picked-up by judicial bodies and made ineffective. The jurisdictional institutions work in a liberal system like a second line of defence against the abuse of state’s power. However, Habermas explains that linking democracy with a substantive set of



values – such as the one supported by liberalism – is irrational.<sup>194</sup> I agree with him, when he argues that democracy should rely only on a minimum set of procedural rules - such as the freedom to intervene in a political discussion and the equality of the speakers - which allow the communicative interaction between members of the political community. This interaction guarantees the linkage between rationality, democracy, and popular will.

Habermas asserts that this linkage is missing in a liberal society which is driven by private interests. Citizens – in liberal societies - participate in the political debate in order to protect their own resources. The expected outcome of this interaction is not rationality, but contractual bargaining. The state's ability to find political solutions is measured on the basis of its ability to reach into the private sphere and settle conflicts. However, the constant emergence of new irrational private claims drives the state into a legitimization crisis.<sup>195</sup> Habermas argues that the only possible alternative to the corruption of liberal democracy is the normative separation between private and public sphere, and the partial return to the *ancient democracy* in which any political decision is taken with the

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<sup>194</sup> J. Habermas, The Theory of Communicative Action, (London: Heinemann, 1984).

<sup>195</sup> This point is the base of Habermas' critique of the relationship between capitalism, liberalism and democracy which he set in his 'Legitimation Crisis'. However, the crisis of liberalism is constant theme in all his works till recent days. See for instance: J. Habermas, Legitimation Crisis, (London: Heinemann, 1976), J. Habermas, The Theory of Communicative Action, (London: Heinemann, 1984), J. Habermas, The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society, (Cambridge: Polity, 1989), J. Habermas, Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy, (Cambridge: Polity Press, 1996), J. Habermas, The Postnational Constellation : Political Essays, (Cambridge, UK: Polity Press, 2001). However, Habermas' critique of liberalism which – as far I know - has not changed since the early days of his career should be distinguished from his analysis of the relationship between legal systems and democracy which has constantly evolved. See for instance: C. Thornhill, Political Theory in Modern Germany : An Introduction, (Cambridge: Blackwell, 2000).



communicative involvement of the entire political community. The separation between private and public spheres will stop the manipulation of the political debate by interest groups – such as economic lobbies, political parties etc.-, and it will give a criterion to distinguish the process of democratic social integration and systematic state activity – such as the implementation of economic policies.

#### B) THE DIFFICULTIES OF EXCLUDING CLAIMS FROM A DELIBERATIVE DEMOCRACY

Habermas argues that the state's policies and social integration are two normatively distinct elements in a political theory. To make this last distinction clearer let us go back to our example of the exclusion of fascism from modern society. For Habermas, the political debate over the ruling out of fascism and the implementation of its exclusion are two normatively distinct procedures. The democratic process which leads to the political decision of excluding fascism creates a sense of cohesion around the outcomes of the debate. In contrast with this procedure, the implementation of the political decision is a systematic activity in which resources are used for achieving a determinate end – such as the exclusion of antidemocratic claims -. In substantive theories of democracy – such as the ones proposed by liberals -, there is no distinction between social and systematic integration.

This confusion – Habermas points out - gives the constitutional document, which sustains the liberal state, a paradoxical relationship to democracy.

*“According to the classical conception, the laws of the republic express the unrestricted will of the united citizens. Regardless of how the laws reflect the existing ethos of the shared political life, this ethos presents no limitation insofar as it achieves its validity only through the citizens’ own process of will-formation.*

*The principle of the constitutional exercise of power, on the other hand, appears to set limits on the people’s sovereign self-determination. The rule of law requires that democratic will-formation not violate human rights that have been positively enacted as basic rights.”* <sup>196</sup>

The paradox is due to the unjustifiable moral values attached to constitutional norms. Habermas agrees that a legislative system is not simply a mere executor of normatively superior political decisions but it also works as a conveyor of moral demands which emerge from the social debate into the systemic organisation of society. Law has a

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<sup>196</sup> J. Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" Political Theory 29/6 (2001), 766-81p.766

privileged status – he explains - which pragmatically bridges the gap between the democratic process which is the real source of political legitimisation - and systemic integration which looks after the economics needs of modern society. On the one hand, the legislative system partly directs resources – capital, labour and administrative power - towards a maximum economic efficiency, and on the other hand it partly provides the rules which modern democracy has to obey.

However, an aprioristic system of laws does not create social integration. Habermas proposes his solution to the problem of the paradoxical relation between rules of law and democracy. He argues that citizens are only obliged by legal norms if they are allowed to participate to the procedure which leads to legislative deliberation. He suggests that a society ruled in such a fashion will combine popular democracy and a Kantian theory of human rights. This linkage – he argues - between law and the process of social integration around an autonomous system of moral statutes is not guaranteed if the public sphere is not completely open to social demands.

He explains that individuals have different criteria of morality, and in a modern pluralistic society, there is little agreement about the connection between morality and statutes. He points out that in liberal societies the connection is a fiction based on the representative government of the majority but the substantial connection between morality and law might be – and in many cases is – contested by a

minority which is close to represent half of the population. This tension between majority and minority affects the legitimacy and stability of the liberal state.

Habermas points out that morality can be connected to legal statutes only if laws are the result of a discussion and this debate satisfies certain procedural presuppositions – such as the equality of the speakers and the openness of the debate -. The collective interaction during a moral discussion prevents subjective reflections on moral issues from becoming legal statutes without being accepted as legitimate statutes. In this representation of democracy, Habermas outlines a consensual theory of legitimacy, according to which constitutional norms can be legitimated only when social interests are discussed through the discursive channel of public debate.<sup>197</sup>

The prospect of achieving this rational legal system, Habermas points out, depends on the procedural protection of the freedom to intervene in the political arena, and on the equality of the speakers. These two limits guarantee that individuals will be involved in the democratic process with the sole interest of disclosing personal reflections and the openness of the public debate guarantees rational political decisions as the final product of an activity of communicative persuasion. If those affected by a legal statute have participated in the communicative process which leads to its approval, the agreements which are reached

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<sup>197</sup> J. Habermas, *The Theory of Communicative Action*, (London: Heinemann, 1984).

within the discussion are morally “correct” and can become legitimate statutes.

C) HOW CAN HABERMAS EXCLUDE NATIONALISM FROM AN OPEN DEBATE?

As I explained in the first chapter, the *modus operandi* which republicans - such as Habermas - use for making their theory is based on an interpretation of the historical protection of some basic democratic values. The methodological procedure they follow is called “*epistemic constructivism*”. Authors - such as Estlund,<sup>198</sup> Nino,<sup>199</sup> and Tully -<sup>200</sup> explain that these kinds of political proposals adopt a two stages process. Nino<sup>201</sup> makes clear that epistemologists, such as Habermas, firstly adopt a procedural theory for finding political explanations, which they consider truthful. Next, epistemologists combine the solutions which have been reached by using the model into a hypothesis – such as constitutional patriotism -. However, this procedure is democratically incoherent. In a political theory, the practice of discussing and contesting previous political decisions is a normative priority which protects the democratic coherence of the

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<sup>198</sup> D. Estlund, "Beyond Fairness and Deliberation", in ed/s J. Bohman and W. Rehg, Deliberative Democracy : Essays on Reason and Politics, (Cambridge, Mass. ; London: MIT, 1997), 173- 204.

<sup>199</sup> C. S. Nino, The Constitution of Deliberative Democracy, (New Haven, Conn.: Yale University Press, 1996). p.110 and successive.

<sup>200</sup> J. Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy." Modern Law Review 65/2 (2002), 204-28

<sup>201</sup> C. S. Nino, The Constitution of Deliberative Democracy, (New Haven, Conn.: Yale University Press, 1996).

community.<sup>202</sup> Thus, assuming that a debate can produce universal political solutions supported by a general consensus and then subjectively combining these decisions – as Habermas does – into a political model is antidemocratic.

The problem – Nino<sup>203</sup> explains - of this *modus operandi* has to do with the difference between epistemology and political theory.<sup>204</sup> I agree with Nino, when he argues that in contrast with a political theory - which should always maintain the democratic coherence of polity - epistemology is concerned with the study of the sources and the limits of knowledge.<sup>205</sup> Epistemologists assert that it is the correctness of the reasoning which underpins our beliefs in what is true knowledge. For example: the result of a basic equation such as two plus two can be considered part of our knowledge only if the procedure, which leads to that result, is correct. Therefore, four, which is the result of the equation, is considered true and it deserves to be inserted as part of our knowledge only on the bases of the correctness of the reasoning which supports it as an outcome of a basic equation. The situation would be different if we had told to a child who learned by heart to count from one to ten that the result of two plus two is four.<sup>206</sup> In this

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<sup>202</sup> J. Tully, "Political Philosophy as a Critical Activity." *Political Theory* 30/4 (2002), 533-55

<sup>203</sup> C. S. Nino, *The Constitution of Deliberative Democracy*, (New Haven, Conn.: Yale University Press, 1996). p.110 and successive.

<sup>204</sup> Before continuing in our analysis, I have make to clear that it is not one of the aims of this thesis to contest the general methodological approach of Habermas' epistemology, instead this detour in our debate over the role of nationalism in modern democracy is only for pointing out the differences between epistemology and political theory.

<sup>205</sup> P. D. Klein, *Epistemology*, 1998, Routledge, Available: <http://www.rep.routledge.com/article/P059>.

<sup>206</sup> The similarities between the adults and children learning process is analysed by Habermas in his theory of communicative action.



case the child would have had no reasons for believing the veracity of our assertion since it has no reasons for considering our procedure correct and he or she might ask why the result is not five.

Starting from similar methodological assumptions, Habermas argues in his political account of nationalism that any rational human being is willing to accept other political claims as part of his or her rational thinking only if he or she has the occasion to question the reasoning which supports the demand. He explains that questioning and debating political claims has two effects on a political community. It creates consensus around what is truthful and morally admissible as he already made clear in his epistemological research (he elaborates this point in 'Theory of Communicative Action').<sup>207</sup> Next, the interaction between individuals creates a sense of social integration which Habermas considers essential to the coherence of the modern state. With his constitutional patriotism, Habermas pursues this idea a step further and argues that a coherent reading of how republican constitutions have been made will justify the ruling out of nationalism – as political stance - from the political arena.

To make this point clearer let us go back to our example of explaining for the first time a basic equation to a child. The first step on the child's learning process of mastering the fundamentals of mathematics is the observation of reality, such as the presence of two pencils on the table. Next, we have to make him or her note how the situation

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<sup>207</sup> J. Habermas, *The Theory of Communicative Action*, (London: Heinemann, 1984).

changes if another two pens are added to the two that are already there. This process constructs on the mind of the child an association between reality and working with numbers which he or she considers correct. On the one hand, this is the first step from which the child will build his/her trust on mathematics as a formal representation of reality. On the other, it excludes any other theoretical process for finding how many pencils are on the table if to a group of two pencils is added another group of two.<sup>208</sup> This last consideration is the base of constructivism: **only constructive proofs**, and entities demonstrable by them, **are admissible on the formation of knowledge**.

Habermas adopts a more complex reasoning, but the key principles he uses in his constitutional patriotism are similar. Firstly, he proposes the adoption of a theory of deliberative democracy which should provide the epistemic model for finding solutions to political problems.

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<sup>208</sup> Are mathematical statements genuinely validated (procedurally), or are procedures accepted when they yield what is mathematically true? Is a mathematic an ensemble of unsupported assumptions? This is one of the debates over the formalistic nature of the so called pure sciences, which might be related to the example, but is irrelevant to the issue discussed here: can Habermas' deliberative democracy leads to universal truth? The short answer to this question is no.

*"Given the challenges that confront today, I want to argue, **the communicative account of republicanism** is more appropriate than either an ethno-national or even communitarian conception of the nation, the rule of law, and democracy."*<sup>209</sup>

Then, he argues that from the ensemble of solutions to past political problems, which he assumes are collected in modern constitutionalism, we should extract an aprioristic barring of nationalism from modern democracy. *"The nation-state **must** renounce the ambivalent potential [The linkage between it and nationalism] that once propelled it."*<sup>210</sup> This praxis which works in philosophy and science is democratically incoherent because it creates decisions which are only based on the assumption of universal validity of previous constitutional norms – not on a democratic decision.

In contrast with this idea, I will argue that a community cannot be forced to accept the absolute validity of previous political decisions. We will go back to this point in the fourth chapter, for now let us continue our discussion on the internal coherence of constitutional patriotism and the consequences of aprioristically excluding political stances from democracy. An ideal democratic society – such as the

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<sup>209</sup> My Emphasis J. Habermas, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999).p.138

<sup>210</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27.p.117.

one Habermas theorised in his theory of communicative action -<sup>211</sup> should be free from any attempts of sectarian colonisation of the epistemological process which leads to the formation of political decisions since this praxis falsifies the validity of democratic choices. To make his point clearer Habermas takes the example of the *modus operandi* adopted in liberal legal systems that try to limit their area of regulation to the reduction of social conflict. He argues that the epistemic validity of a political decision is ensured if the debate over the morality or the veracity of a claim considers all participants equal and the debate is open to any political claim. He argues that openness of the public sphere is normatively above other social demands. Habermas points out that the epistemic validity of a claim is impossible within a liberal society since individuals use constitutional protection of their private interests for forcing their claims through the political debate. Confusing the protection of private interest with the protection of democracy is a general problem of a liberal society which is magnified in the European Union where member-states irrationally protect their national interests. Habermas argues that the irrationality of the linkage between state and the protection of national interests is made obvious by a rational reading of the history of constitution making.<sup>212</sup>

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<sup>211</sup> J. Habermas, *The Theory of Communicative Action*, (London: Heinemann, 1984).

<sup>212</sup> I have to stress again that in Habermas' political theory there is no distinction between civic nationalism which endorses democracy and underpins the political template of all European states, and ideological or ethnic nationalism which embrace racism.

We can say that it seems absurd to demand the ruling out of the protection of national interests from a debate which takes place almost exclusively for protecting them, but this is a pragmatic point which has no effects on Habermas' political theory. Given that Habermas' hypothesis rules out any linkage between democracy and substantial claims, we have to assume that the republican values he wants to protect by ruling out nationalism from the modern state are procedural requirements of his theory. However, I want to argue that this exclusion is still democratically problematic. Can Habermas apply his epistemological theory in politics? Can a theory of deliberative democracy insert a dismissal of claims related to national identity from the political spectrum? Is this not in antithesis with the criteria of openness of the public debate which links democracy to legality? More importantly for us: is this exclusion democratically dangerous?

## 2. THE INTERNAL INCOHERENCE OF CONSTITUTIONAL PATRIOTISM

Let us try to answer the questions which closed the previous section. I pointed out that irrational claims, such as those supported by fascists for example, can be ruled out from the democratic arena. Fascist claims, such as imprisonment without just process, racial or ethnic segregation etc., can be easily spotted in the course of a democratic debate and thus excluded; but if he is to maintain the coherence of his procedural theory, Habermas cannot have recourse to a *substantive* criterion for that is to count as an anti-democratic claim. However, it

seems that Habermas seeks to make a special case of nationalism. As I said earlier, this constitutional patriotism appears to insert itself in the middle ground between a procedural and a substantive theory of democracy. On the one hand, it urges that the only form of true democracy is one which allows the communicative interaction of all citizens. On the other, it seems to criticise nationalism for being an irrational and democratically dangerous political 'input' into the communicative process and thus one which should be aprioristically ruled out in a democratic community. It appears that Habermas in fact pre-empts the conclusion of communicative debate, excluding *a priori* all substantive claims related to national particularities from his theorisation of the patriotic state. But this surely contradicts his normative requirement that public debate must be open. And this is crucial. Recall that for Habermas the openness of the public sphere is a central guarantor of the legality of the legal system. Law can be more than formally legal only if two normative conditions are satisfied: public discourse in the public sphere and an extension of the latter includes moral discourse. Thus, certain demands originating from more general claims to the legal protection for national particularities will not pass the rationality test of a democratic debate. The point is, however, that this can be considered as normative presuppositions in the public sphere only after discussion. Nationalistic claims, such as all other political demands, cannot be ruled out on the ground of their supposed irrationality, but only on the



ground that they transgress the procedural requirements of democracy. By excluding claims related to national particularities because they are irrational, Habermas moves the foundations of constitutional patriotism from the normative presuppositions upon which his communicative political theory was built.

To rescue Habermas' constitutional patriotism we might perhaps speculate that Habermas' is no more than a suggestion, which would need to pass the scrutiny of the public sphere before it could assume the universal status needed to become part of the legal system. This might retain the theoretical consistency of Habermas' proposal, but it would not exclude the possibility of a constitutional system which promotes and defends national identity: for it goes against Habermas' insistence that "[T]he lesson to be learned from this sad history is obvious: the nation-state must renounce the ambivalent potential that once propelled it."<sup>213</sup> This attempt to rescue Habermas' patriotism therefore faints.

### 3. THE DEMOCRATIC RISK OF AN APRIORISTIC EXCLUSION OF NATIONALISM

In contrast with Habermas, I argue that we cannot aprioristically exclude nationalism from democracy. National identities might

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<sup>213</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27, 117.

support democratic claims such as the protection of a language, national festivities etc. and antidemocratic demands – such as the exclusion of ‘aliens’ from the state’s political arena -, but I argue that the evaluation of the democratic compatibility of these claims should be left to the community itself. The difficulties of using the historical evolution of constitutionalism to exclude nationalism is even more evident if we consider the logical implications of Habermas’ argument for other constitutionally protected political elements of modern society.

Habermas argues that the political system which supports the constitutional protection of national self-determination is made obsolete by an historical reading of the relation between democracy and constitutionally protected republican values. But to dismiss claims related to national identity from the political spectrum is to superimpose rationality, not retrieve a model of social cohesion. Let us take the example of religion to clarify this point. The link between the history of constitution-making and religion plays a political role in most modern states.<sup>214</sup> It is widely believed that the protection of the freedom of faith is historically the first constitutionally protected right to be inscribed as a basic principle of modern constitution-making. The American constitution is the first historical example: ‘[T]he congress shall make no law respecting an establishment of religion.

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<sup>214</sup> D. Marquand and R. L. Nettler, *Religion and Democracy*, (Oxford: Blackwell, 2000), R. F. Thiemann, *Religion in Public Life : A Dilemma for Democracy*, (Washington, D.C.: Georgetown University Press, 1996).

*Or prohibiting the free exercise thereof; or abridging the freedom of speech, or press.*'<sup>215</sup> On Habermas' view of the relation between nationalism and constitutionalism, the republican protection of religious freedom is part of the historical evolution of modern constitution-making. There are cases in which states have a constitutionally protected religion, e.g. Sweden and Norway; and other secular states have preferential relationships with some recognised religions, e.g. Germany, Poland, Italy, and Austria. But the simple fact remains that none of these countries is particularly in danger of losing the control of their democratic arenas at the hands of religious extremists. Religion might be considered an ensemble of anachronistic beliefs which are born out of a psychological need to explain mysterious natural events. Subsequently, it has become an efficient method of creating social cohesion, similar to that provided by the idea of national identity to European states in the sixteenth century. Continuing the parallel with what Habermas has said about nationalism, the positive effect of creating a sense of belonging to a particular group is in a precarious relationship with the irrationality of its origins. If the balance is not well adjusted, the irrational aspect may take over political debate, and religious claims become a pretext for increasing sectarianism, discrimination and ethnic cleansing, as the persecution of Jews worldwide shows.

However, the protection of freedom of faith has a regulatory effect on

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<sup>215</sup> The Constitution of the United States, I amendment of the Constitution of the United States, 1791.

political debates where religious beliefs conflict with the policy of a secular state. For example, consider a political debate over the right to interrupt unwanted pregnancies: religion's supporters can argue for the legal protection of their ideal of justice without fearing that their claims will be dismissed on the ground that religious beliefs are irrational. This approach has two advantages: first, religion is treated as part of the cultural *differentiae* of modern society. Given that there is direct relation between the number and the quality of political claims and the rationality of political agreement, the constitutional protection of freedom of faith indirectly increases the level of rationality of decisions taken within the political arena. Second, such protection makes debate possible without requiring that believers' presuppositions be questioned. For example, 'the right to interrupt unwanted pregnancies' might be contested by religious believers who accept as true that life is an irreplaceable gift of God but the debate is not conducted in terms of whether or not God exists.

Let me pursue this with a second example, one which directly involves the myth of national identity. Mr. Jacopo Levi, an Italian citizen, and his family decide to settle in Israel, and they buy over the internet a piece of land from an Israeli company helping new Jewish settlers. The Levi family is unaware of the fact that there is almost no private land in Israel (it is entirely owned by the state). Consequently, the company is bogus. When the Levi family arrives in Israel their bogus estate agent escorts them to the land, where material has been

prepared for them to start their new lives, and collects his fee. However, the next day Dr. Walid Saliba, a Palestinian doctor who works in Jerusalem, knocks on the door of their prefabricated bungalow and asks them what they are doing on his land. Mr Levi explains to Dr. Saliba that the Bible gives to him, as a Jew, an ancestral right to live on this piece of land, which was once part the Empire of King David. Dr. Saliba, who is an atheist and is not impressed with this argument, explains to Mr. Levi that there is little archaeological evidence that King David ever existed, and that Jews cannot claim rights to this land which belongs to him. Mr. Levi finds Dr Saliba's argument outrageous and points out that the existence of King David is documented by the words of God as transcribed in the Bible and that no other evidence is needed to underpin his claim. At this point Dr. Saliba affirms that establishing the existence of God is even more difficult than establishing the existence of King David, whereas he can prove that this estate has belonged to his family since the middle ages, when his ancestors settled in this desert. Mr. Levi then points out that this constitutes an admission that his rights, which originate in the Bible, historically precede Dr. Saliba's claims, and that, therefore even under Ottoman law – which considers the right of property not to be subject to desuetude – the land he bought belongs to the people of Israel.

Now, both parties in this dispute argue that the reasoning which supports 'the other' argument is irrational. They challenge the validity



of the premises which support their respective arguments and they assume that the impossibility of finding any “middle ways” is a sufficient reason for denying each other’s claims. However, this is to confuse the incompatibility between two sets of beliefs with a rational resolution of the issue. And when Habermas demands the exclusion of nationalism from modern democracies he commits the same theoretical mistake: he extracts a set of values from the historical evolution of constitutionalism, and then, assuming the rational validity of these values, he demands the exclusion of nationalism from democracy.

If we accept that such exclusion is a rational feature of an ideal constitution, then any political demands which refer to a sociological feature of modern society, nationalism, religion etc., would have to be barred from being discussed in the political arena on the grounds that they are incompatible with the rational evolution of constitution-making. This was sensed by Canovan, when she pointed out that constitutional patriotism enlarges the gap between community and legal system and makes the state illegitimate,<sup>216</sup> but few realised that Habermas’ idea of a patriotic state actually requires an anti-democratic *a priori* exclusion of *any* forms of thinking incompatible with the set of norms he considers any constitution should embrace. The same reasoning that Habermas uses to extract from an historical analysis of the relationship between nationalism and the European

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<sup>216</sup> M. Canovan, Patriotism Is Not Enough, (Exeter: University of Exeter Department of Politics, 1997).



process of constitution-making might be analogically extended (without boundaries) to other political entities which are grounded in non-verifiable rational demands. These kinds of dismissal are not related to the acceptability of these claims within the political arena, but rather to the internal compatibility of their sociological basis with the rational set of rules Habermas supposes should be adopted by an ideal constitution. This consideration makes constitutional patriotism a theoretical instrument for forging unquestionable consensus around an idea of superimposed rationality, which induces homogenisation and discrimination. This aspect of constitutional patriotism makes Habermas' hypothesis similar to those undemocratic proposals by nationalists which the author so convincingly rebuts.

#### 4. THE PRAGMATIC EFFECTS OF CONSTITUTIONAL PATRIOTISM

I agree with Habermas when he argues that freedom and equality for all are the only procedural requirements of modern democracy. In contrast with these principles, in constitutional patriotism Habermas demands an aprioristic exclusion of nationalism from democracy. He asserts that the relationship between constitution and nationalism is irrational and it might endanger republican values. Habermas argues that an a priori exclusion of nationalism is supported by the historical analysis of the process of European constitutionalism which makes the ruling out of ethnos from democracy a procedural logical requirement of his theory.

However, I explained that Habermas' idea of using the historical evolution of constitutionalism is debatable and cannot support the introduction of a new requirement into his theory of deliberative democracy. In addition, I pointed out that the relativistic nature of Habermas' historical analysis of constitutionalism could be extended to include the ruling out of any political movements which do not fit his idea of rationality. This pragmatic aspect has a theoretical repercussion for Habermas' hypothesis of democracy. Habermas argues that each country develops its own "constitutional culture" and he suggests that the republican values which constitute the back bone of modern liberal democracy are interpreted in relation with individual national histories. He argues that the patriotic desire of protecting these historical interpretations creates a political commitment which should take the place originally occupied by nationalism. The problem here is how to distinguish the protection of republican values which characterized individual European states from nationalism. To clarify this issue Habermas tries to show how his hypothesis can provide a solution to three ongoing discussions related to the political role of the national state in modern democracy. To support the beneficial effect of adopting constitutional patriotism as the theoretical template of modern state, Habermas tests his hypothesis in three ongoing discussions related to the political role of the national state in modern democracy. The three issues in which Habermas wants to test the validity of his proposal are: the protection of national minorities, the

democratic deficit of international organisations such as the European Union, and the right of humanitarian intervention in case of crimes against humanity such as genocide. However I will explain that these attempts of implementing his theoretical analysis of the connection – or the lack of it- between state and nation magnify the shortcoming of his aprioristic rejection of the role of nationalism from modern democracy.

#### A) THE PROTECTION OF MINORITIES

Habermas points out that minorities mistakenly considered the right of self-determination as the only guarantee for the protection of their cultural diversity. As I mentioned on the first chapter, Habermas argues that the right of national self-determination is an irrational misinterpretation of the individual right of self-determination which supports the template of the liberal state.

*“Kant ascribes to every human being as such  
the right to have rights and to regulate his life in  
common with others in such a way that everyone  
can enjoy equal liberties in accordance with  
public, coercive laws.*

*But this does not settle who may actually make use of this right with whom and when; nor does it settle who may unite into a self-determining commonwealth on the basis of a social contract.*"<sup>217</sup>

Habermas makes clear that the problematic aspect of assuming the existence of a right self-determination of the nation becomes obvious when we are searching for the limits of this communal right. He explains that nationalists firstly misjudge the relation between individual rights and shared cultural identity; next they propose a solution – the right of self-determination of all national minorities – which is unrelated to the problem of having different communities within a polity. The difficulties of having a national minority physically embedded into wider national communities - Habermas argues - cannot be eliminated through the formation of a new national state which moves the problems under a different banner. He argues that the protection of minorities can only be achieved “[T]hrough a process of inclusion that is sufficiently sensitive to the cultural background of individual and group-specific differences.”<sup>218</sup>

If it is easy to agree with Habermas on the ‘Chinese box effect’ of demanding the right of self-determination of the national minority, less convincing is considering cosmopolitanism capable of protecting

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<sup>217</sup> J. Habermas, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999).p.140

<sup>218</sup> Ibid. p.145 [My Emphasis]

a minority. Firstly, there is a problem with the distinction - which Habermas makes - between national minorities and national community. The issue here is not terminological nor is related to immigration; Habermas distinguishes the national community which is a dangerous historical fabrication from 'born minorities' which he inserts on the trend of multiculturalism. As I explained earlier on this thesis, conceptualizing the idea of national identity is a theoretically precarious process which is open to relativistic interpretations. There is little certainty on what are the characteristics of the national community and even less confidence on how cultural or ethnical features can be used for separating a community from another. Secondly, there are the questions of how and who decides what minorities can demand and what they cannot.<sup>219</sup>

Does he assume that majorities are capable of constitutional patriotism and national minorities are not? Or does he ignore that national majorities are national communities? Habermas argues that an inclusive model of democracy sensitive to differences should protect the individual rights of the members of the minority group, but one of the pillars of constitutional patriotism is the aprioristic exclusion of nationalistic claims from the political debate. This normative ruling out of nationalism from modern democracy and the protection of minorities are problematic. On the one hand, the members of the national community who represent the majority cannot demand the

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<sup>219</sup> Ibid.p. 146

protection of social features such as their language and traditions since they are the historical result of arbitrariness and irrationality. On the other hand, members of the national minority can demand the protection of their cultural heritage since this is one of the aspects of a multicultural society.

This separation appears artificial. Even if we might envisage that the creation of a state for any nation is contra factual, this should not be an argument for aprioristically excluding a political claim in a theoretical proposal. There is more here than an internal incoherence. A national minority group is normatively identical to the national majority group which holds it captive under the imposition of a majority vote. Imposing an exclusion of nationalism from the political arena cannot spare the protection of minority rights – which Habermas wants to be protected - since the reasons which support both forms of nationalism are identical. If Habermas takes his idea of constitutional patriotism to its logic extent he has to exclude the protection of minorities' rights from modern democracy. The obvious effect of this ruling out is the endorsement of a system which squashes cultural and political *differentiae*. Habermas does not realise that his idea of constitutional democracy can transform democracy into a dictatorship of a majority which imposes its will to a democratically defenceless minority. This is exactly the starting point of his critique of liberalism, which then motivates the making of his theory of constitutional patriotism.



There are two different debates over the democratic deficit on the European Union. Firstly, there is a discussion which involves mainly constitutional lawyers and political theorists over the democratic incongruence of the European legislative processes. The main actors in this process are: the Commission, as the initiator of Community legislation; the Parliament, as co-legislator; and the Council, as the ultimate decision-maker.<sup>220</sup> The problem with this repartition of roles is that the Commission, which is an unelected body, has the power to set the agenda for the two elected institutions: the Parliament<sup>221</sup> and the Council.<sup>222</sup> The exclusion of democratic representatives from the decisional process that chooses which issues should be discussed by the political arena makes the European legislative praxis democratically precarious. In his theory of constitutional patriotism, Habermas does not directly discuss this problem since he considers it – and I agree with him – a general problem of capitalistic societies not a particular problem of the European Union. In capitalistic states the

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<sup>220</sup> These labels are over-simplified: there are a variety of law-making procedures that require the institutions to interact in different ways (essentially, dependent on subject matter/Treaty provision). See for instance: P. P. Craig and G. De Búrca, *EURO Law : Text, Cases, and Materials*, (Oxford: Oxford University Press, 2002), K. P. E. Lasok and D. Lasok, *Law and Institutions of the European Union*, (London: Butterworths, 2001).

<sup>221</sup> The Members of European Parliament are directly elected in European Elections.

<sup>222</sup> The Council is composed of one representative at ministerial level from each Member State, who is empowered to commit his Government. Council members are normally MPs - elected by national parliaments – and therefore democratically and politically accountable for their activities. This is in contrast with the members of the commission who are appointed.

Which Ministers attend each Council meeting varies according to the subject discussed, although its institutional unity remains intact. Thus, Ministers for Foreign Affairs attend in the configuration known as the General Affairs Council to deal with external relations and general policy questions, while the Ministers responsible for economic and financial affairs meet as the Economic and Financial Affairs Council, and so on. For more information see : <http://ue.eu.int/en/Info/index.htm>

practice of deciding political themes is hijacked by the strategic use of mass-media which almost exclusively directs the interest of the public opinion to issues which are economically relevant. In this contest, – Habermas argues - the fact that Europe is institutionally unbalanced in favour of non-elected institutions such as the Commission is a pragmatic detail which magnifies the democratic deficiency of the liberal state.<sup>223</sup>

Secondly, there is a discussion over the role of the European *demos* on the future of the European Union which tries to answer the question: should we have a European *Demos* bounded by a European Constitution? In his theory of constitutional patriotism, Habermas argues that a European *demos* is not a requirement for a European Union state. The European integration project should exploit the already present common cultural heritage with the creation of a communicative network among Europeans.<sup>224</sup> This shared political culture derives from the sharing of a common history.

Here, Habermas makes direct reference to the history of the two World Wars where Europeans have learned to despise nationalism and its policies of ethnic and racial segregation. Again, the claim of the existence of a common culture out of a thousand years of wars appears far-fetched, but historical and pragmatic contradictions between

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<sup>223</sup> In other words, the fact that interest groups might manipulate the political debate is not a particular issue of the European Union, instead, it should be considered as a general problem of any democratic society.

<sup>224</sup> “[T]he initial impetus to integration, in the direction of a Postnational society, is not provided by the substrate of a supposed ‘European people’ but by a communicative network of European-wide political public sphere embedded in a shared political culture.” J. Habermas, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999).p.153

Habermas' theory of democracy - such as the fact that the European Union plans to expand in North Africa (e.g. Morocco) and in the Middle-East (e.g. Turkey, Israel) - are not reducing the theoretical value of his proposal. Without dragging back this analysis to a historical account of the relation between democracy and nationalism that we saw in the first and second chapter, I want to argue that Habermas' idea of a common European culture is incoherent with the theoretical preconditions upon which his theory is built. In constitutional patriotism, Habermas argues that a rational reading of a common tradition of constitution making will exclude nationalism from modern democracy. However, in his analysis of the possibility of having a European state Habermas seems to insert a common culture as a requirement for the creation of a public sphere.<sup>225</sup> This referring to a common culture as a requirement for the creation of a new political entity such as the European Union is theoretically similar to the reasoning that Habermas proposes for excluding nationalism from the template of the modern state. Firstly he puts forward a subjective historical account of European history which supports his thesis; next he considers his historical speculation as a normative element of modern democracy.

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<sup>225</sup> “*To be sure, a politically constituted context of solidarity between citizens who, despite remaining strangers to one another, are supposed to stand up for each other is a communicative context ‘involving demanding preconditions’ [Italic on the original text].*” Ibid. p.158

*“Accordingly, from a normative perspective there can be no European federal state worthy of the title of a European democracy unless a European-wide, integrated public sphere develops in the ambit of a **common political culture**: a civil society encompassing associations, nongovernmental organisation, citizens’ movements, etc.”*<sup>226</sup>

The requirement of a common political culture which - Habermas argues- has made obsolete nationalism should be considered the theoretical base upon which democracy should be built. Apart from the fact that this idea of a European common culture for underpinning a European State is extremely close to MacCormick’s hybrid idea of nationalism - which Habermas certainly would not embrace -, this connection between supposedly shared values and institutions seems democratically dangerous. As I said about the exclusion of nationalism, a theory of deliberative democracy normatively relies on the existence of an open democratic arena where different claims are discussed and where individuals can reach political agreements. These diversified political claims cannot be but the expression of a culturally diversified society. Demanding the exclusion of nationalism and then the creation of a common political culture as a precondition of a democratic European Union, Habermas reduces the level of *cultural*

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<sup>226</sup> Ibid.p.160 [My emphasis]

*differentiae* and shrinks the political debate into the limits of what he subjectively considers rational. This is, even if we consider his idea of a European common culture as a procedural requirement – which he might grasp from a historical reading of the connections between European nations - since this prerequisite presupposes a separation between elements which are part of the European common culture and features which are not. Therefore considering the existence of a common European culture as a prerequisite for a European Democratic state supports a cultural process of homogenisation which is in blatant contrast with the requirement of the openness of the public sphere.

#### C) THE RIGHT OF HUMANITARIAN INTERVENTION

Habermas also tests his tenet on the evolution of the right of humanitarian intervention. He argues that the historical changes in the understanding of the right of national self-determination by international organisations - such as the United Nations and the European Union - support the adoption of a new theoretical template for the implementation of Human Rights in cases of crimes against humanity – such as genocide etc.<sup>227</sup> Until recently international law considered the principle of non intervention on the internal affairs of a sovereign state and the “*pacta sunt servanda*” - agreements must be followed - as the few basic rules of international relations. Obviously,

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<sup>227</sup> Ibid.p.150 and successive.



the international community might question the legitimacy of a state's internal policies but it cannot act for imposing international law. Let us take the example of the Italian fascist regime to make this point.

The fascist party in Italy obtained the leadership by means of the so called Acerbo's law. The parliamentary approval of such law took place in a gallery which was filled with fascist thugs who were well-known for using their violent methods against their political enemies. Not a long time after, the leader of the opposition - Giacomo Matteotti - was killed, the parliament was dissolved, and the opposition parties made illegal. Finally in 1938 the Fascist government adopted the system of racial laws which started the process of discrimination against Jews and ended up with the deportation of thousands of civilians to the concentration camps. This chain of events leaves little doubt about the substantial illegality of the fascist government however following the traditional interpretation of the principle of non intervention on the internal affairs of sovereign states, the policy of racial segregation of the Italian government during the nineteen-thirties was an internal affair and therefore an international interference was unjustifiable.

However, Habermas argues that after the genocide of the Jewish minority during World War Two - which made obvious the potential of the industrial modern state for enslaving and killing millions of innocent civilians -, the principle of non intervention into the internal affairs of a national state has been put under scrutiny.



*"The conception of sovereignty in classical international law entails a prohibition on interference in the internal affairs of an internationally recognized state. This prohibition of intervention is indeed reaffirmed by the UN Charter; but from the beginning it stood in tension with the development of the international protection of human rights."*<sup>228</sup>

He points out a theoretical support for an external intervention on the internal affairs of a sovereign state cannot be found on the traditional understanding of the international relations between states. Habermas agrees with the critique of the right of intervention proposed by communitarians such as Walzer.<sup>229</sup> Walzer explains that it is a theoretical mistake to consider the United Nations General Assembly entitled to enforce the protection of Human Rights against a formally legitimate government. The Assembly is composed by representatives of internationally recognised countries not by democratically elected governments, thus its decisions are undemocratic and illegitimate.

In order to overcome the theoretical problem of legitimizing the action of non democratic organisations Habermas suggests that a rational interpretation of Human Rights should not be considered as part of the international law but as part of a "*cosmopolitan law*". "*But the*

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<sup>228</sup> Ibid.p.147

<sup>229</sup> Habermas quotes; M. Walzer, *Just and Unjust Wars : A Moral Argument with Historical Illustrations*, (New York: Basic Books, 1977).

*decisions and strategies of the world organisation, and specially the intervention of forces carrying out UN mandates since 1989, indicate the direction along which international law (Völkerrecht) is gradually being transformed into a **cosmopolitan law** (Weltbürgerrecht).*"<sup>230</sup>

Habermas argues that it is the new interpretation of Human Rights that obliges the United Nations Assembly to go beyond the theoretical limits of the right of self-determination of the nation. He asserts that the atrocities of the Holocaust have changed the meaning of the protection of liberal rights from basic democratic principles to universal laws. *"These political and legal developments are reactions to an objectively changed situation. The unprecedented nature and the scale of the government criminality [...] makes a mockery of the classical presumption of the innocence of the sovereign subjects of international law. [...] [P]eacekeeping must take into account the complex social and political causes of war."*<sup>231</sup>

Similar to what he said about the exclusion of nationalist claims from the theoretical structure of the democratic state, Habermas argues that it is a rational interpretation of the Charter of the United Nations which makes the protection of Human Rights a basic requirement of modern democracy. *"Such interpretations in support of internal democratization are, however, irreconcilable with a conception of democratic self-determination that grounds a right of national*

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<sup>230</sup> J. Habermas, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999).p.150

<sup>231</sup> Ibid.p.150

*independence for the sake of the collective self-realisation of a cultural form of life.*<sup>232</sup>

In accordance with what has already been said about the distinction between substantive and epistemic theory of democracy, Habermas' legitimization of violent implementation of Human Rights should be considered as a procedural element of modern democracy. If Habermas endorses the substantial values of the Human Rights' theory, he also supports the ownership of rights which is the ideological starting point of liberalism.<sup>233</sup> This would be incoherent with the theoretical requirement of openness of the public debate which is one of the pillars which support his theory of communicative action, and it is in contrast with the motivation which prompts Habermas to propose his 'alternative' to the liberal state. However, historical analyses are unavoidably relativistic and they cannot provide the universal justification needed for inserting the protection of Human Rights into epistemic theories such as Habermas' theory of communicative democracy.

Habermas' idea that the implementation of the Charter of the United Nations is the signal of a change of its interpretation cannot be but a personal assumption which needs to be discussed within the public

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<sup>232</sup> Ibid.p.150

<sup>233</sup> Habermas proposes his theory of communicative democracy as an alternative to liberal society. His radical break with Liberalism is grounded on the relinquishment of the protection of the ownership of rights. Habermas makes the point that a political system based on protection of rights transforms the democratic debate in a strategic game where individuals pursue the protection of their private interests – not morality of truthfulness -. In order to propose an alternative to this system Habermas argues that the openness of the public debate and freedom of speech should substitute the concept of *Habeas corpus* – literally the ownership of the body – as a basis of the political system. From this presupposition it proposes a theory based on the communicative interaction which should substitute the political bargaining of liberal society.

debate before being considered as part of the legal system of a community. Demanding a 'cosmopolitan right' - which he assumes is embedded in modern democracy - to implement the Charter of United Nations by antidemocratic organisations is not only theoretically incoherent, but also dangerous since it implies that the legal system based on the evolution of western philosophy bears universal values that allow the squashing of the democratic practices of people which cannot – or does not want to - be represented by the systems of values that these international organisations uphold. Habermas should accept that these values are not universally verified and more importantly they cannot redeem the activity of unrepresentative international institutions.

##### 5. THE DEMOCRATIC INCOHERENCE OF CONSTITUTIONAL PATRIOTISM AND THE NEED FOR A NEW MODEL

In this chapter Habermas' proposal for a patriotic state has opened our debate over the relationship between nationalism and constitutional democracy. He explains that the relation between a capitalist society and the model of social inclusion of the national state is irrational and democratically dangerous. He argues that a society which relies exclusively on the values of liberalism is lacking social integration. This lack of social integration cannot be compensated by sharing the same nationality. Ethnicity is an irrational belief which might be strategically abused for discriminating and persecuting non-members

of the national community. This danger – Habermas argues – should be limited by a procedural exclusion of nationalism from modern constitutional democracy. He suggests that a rational reading of the history of constitutionalism should support the exclusion of the irrational myth of national identity from modern democracy and the adoption of a new template for the state which he called constitutional patriotism. This hypothesis of patriotic state would help to solve the democratic issue of international organisations - such as the European Union and the United Nations -, and the protection of religious and national minorities.

I agree with Habermas' critique of the relation between liberalism and modern state. On the one hand liberalism cannot provide the model of social integration which can bind the members of the community. The prospect of equal opportunities and fair redistribution of resources is frustrated by an endemic distrust of public intervention in a liberal economy. The result is a society in which greed leads to an unfair accumulation of resources in the hands of a few who undemocratically influence the state's policies at a global level.<sup>234</sup> I also agree with

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<sup>234</sup> How can a second or third world country democratically decide its future when multinational companies and multinational organisations – such as the World Trade Organisation – *dictate* its internal policies?

On the other hand, liberalism fails to protect the values which support it as a substantive theory of justice. Firstly, the liberal state confuses the protection of the state apparatus with the protection of republican values. The Antiterrorism legislations adopted after the episode of September the 11<sup>th</sup> are an example of how the liberal state increases its protection as an autonomous apparatus by annihilating the jurisdictional guarantees of its subjects under the banner of the protection of liberal values. Secondly, the protection of liberal values is directly linked with the protection of private interests. Liberal states behave in the international arena as private entities which try to maximize their wealth in an environment with limited resources. This *modus operandi* confuses the individual right of self-determination which is one of the pillars of a liberal society with a national right of self-determination which is alien to liberalism. The pragmatic effect of tiding the protection of republican values with private interests is that international intervention protects wide violations of Human Rights – such as the case of genocide – only when these infringements reach the phase of the biological elimination.



Habermas' when, in his theory of communicative democracy, he provides the basis for an alternative to the liberal state, but his constitutional patriotism cannot be considered a suitable substitute to the theoretical model of the nation-state. The connection between state and nation is precarious and it might be democratically dangerous, but I suggest that a template for the state should recognise that modern society sustains itself by a process of social integration which is guaranteed only by the openness of the public debate. Instead, Habermas suggests that the extension of the political debate can be normatively limited by a rational reading of the evolution of constitutionalism. This claim is theoretically unsupported. Given the normative interrelation between the extension of the political debate and the legitimacy of the decisions taken within the political arena, I argue that an aprioristic restriction of the political arena should be considered democratically incoherent since it forces a process of homogenisation which supports antidemocratic solutions on the basis of a subjective reading of the history of constitutionalism. This search into the past might provide reasons for supporting a political demand not for excluding *a priori* a political stance.

In conclusion, I agree with Habermas' claims that we need to re-think the role of nationalism in modern constitutional democracy, but we have to acknowledge that all political entities – and this includes national identities - contribute with their demands to maintain the



linkage between population (*demos*), democratic practice, and norms  
(*leges*).

## CHAPTER 4

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### TULLY'S IDEA OF CONSTITUTIONAL MULTINATIONALISM

#### 1. MULTINATIONALISM AGAINST PATRIOTISM

In the preceding sections of this thesis, we set the theoretical frame of debate over the role of nationalism in modern democracy by analysing the limits of Habermas' cosmopolitanism. I argue that the debate over the role of nationalism in modern constitutional theory hinges *only* on the relationship between democracy and the admissibility of political claims in the political arena. I argued that nationalist claims cannot be excluded without compromising the democratic coherence of a community. However, how can modern constitutional democracy accommodate ethnocentric political claims? In what follows I shall argue that a theory of multinationalism, similar to the one proposed by Tully,<sup>235</sup> provides an answer to this question.

However, Habermas' patriotism focuses on finding radical solutions to the problematic relations between nationalism and democracy, whereas Tully's multinationalism wants to protect the role of national identities in modern democracy. This last perspective, which I

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<sup>235</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995), J. Tully, "Diversity's Gambit Declined", in ed/s C. Cook, *Constitutional Predicament : Canada after the Referendum of 1992*, (Montreal ; London: McGill-Queen's University Press, 1994), J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 1-35.

endorse, maintains that there is a normative relationship between the constitutional practice of acknowledging a national identity and democracy. In this chapter, and on the following two, I will explain the reasons which support this choice.<sup>236</sup>

#### A) TULLY AND HABERMAS: A COMMON CRITIQUE OF MODERN CONSTITUTIONAL DEMOCRACY

We should start our journey by introducing the theoretical basis upon which Tully builds his analysis of the role of nationalism in modern democracy. I will do this by comparing Tully with Habermas. This brief comparative analysis has the advantage of reducing the explicative difficulties of introducing another highly theoretical author and will provide a clear distinction between the works of the two theorists which are often discussed together by constitutional lawyers. I will make clear that Habermas and Tully share a similar critique of modern constitutionalism but their solutions to the impasse of modern liberal democracy are normatively different.

Let us start by pointing out the similarities between the two authors, and then I will explain why Tully's theory is better analysis of the relationship between national identities and modern constitutional

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<sup>236</sup> I can anticipate that the idea of multinationalism endorsed in this thesis ultimately derails from the path proposed by Tully (chapter 5). He combines liberal values with the constitutional recognition of national identity. By endorsing an aprioristic protection of liberal values, Tully undermines the procedure of recognition of national identity. This makes his proposal democratically coherent only for those national communities which embrace liberal values. In contrast with Tully, I will argue (chapter 6) that we have to adopt a more radical model of democracy where multinationalism is limited only by a minimal set of procedural requirements. By adopting this idea of constitutional democracy, the dangers which nationalism might bring to a political community are part of the risk that a community has to take in order to ensure its democratic cohesion and finally the 'legitimacy' of its legal system.

democracy. Tully<sup>237</sup> and Habermas<sup>238</sup> point out that contemporary constitutional democracy relies on the existence of a shared agreement on the substantial moral validity of liberal rights which is in blatant contrast with the process of democratic deliberation.<sup>239</sup> Liberal societies – Tully and Habermas make clear - use two arguments to justify the existence of this link between a system of substantive values and democracy.<sup>240</sup> Firstly, liberals assert that liberal values are universal. Secondly, they argue that these values normatively support the constitutional system and all the norms which are derived from that system. Tully and Habermas are critical of the coherence of these two elements.<sup>241</sup> They explain that the system of constitutional rules based on liberal theory betrays the democratic principles as originally set up by democratic societies. “*These democratic practices of deliberation [which are adopted in liberal societies] are themselves rule governed (to be constitutionally legitimate), but the rules must also be open to democratic amendment (to be democratically legitimate).*”<sup>242</sup> The two authors argue that an ideal form of democracy - such as the one adopted in Athens in the fifth century BC - must

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<sup>237</sup> J. Tully, "Political Philosophy as a Critical Activity." *Political Theory* 30/4 (2002), 533-55, J. Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy." *Modern Law Review* 65/2 (2002), 204-28

<sup>238</sup> See for instance: J. Habermas, *Legitimation Crisis*, (London: Heinemann, 1976)., J. Habermas, *The Structural Transformation of the Public Sphere : An Inquiry into a Category of Bourgeois Society*, (Cambridge: Polity, 1989).

<sup>239</sup> We will see later that Tully adopts a procedural interpretation of liberal rights for his theory of multinationalism which is no less incoherent than Habermas', but this is not the point in discussion here.

<sup>240</sup> See for Instance: J. Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972).

<sup>241</sup> We will in chapter five the differences between liberalism and Rawls's neo liberalism. J. Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), J. Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972).

<sup>242</sup> J. Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy." *Modern Law Review* 65/2 (2002), 204-28p.205 [My Emphasis]

allow the direct political participation of all members of the polity. This form of direct participation is impossible in modern states which govern millions of individuals.

Tully agrees with Habermas that constitutionalism has solved the problem of regulating the life of millions of individuals by assuming the validity of a set of constitutionally protected rights. However, both authors explain that modern constitutionalism, which relies on a system of substantive values, is democratically precarious.<sup>243</sup> Firstly, it antidemocratically imposes a grid of values which substantially limits the public debate by excluding political entities from the political arena, such as extremist religious groups. Secondly, the procedural connection between subjects and their indirect representatives is weakened by pragmatic limitations.

Those elected are not bound by what they have claimed in their political manifesto until they have to face a second election. Next, the cost of the system opens the door to strategic abuse by antidemocratic entities such as political lobbies which will exchange political favours for economic support during the political campaign. The most obvious of these forms of interference in the democratic process is the relationship between political parties and media groups. In a polity where a disproportionate part of the media is concentrated in the hands of few individuals, as is the case in many western countries

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<sup>243</sup> See for instance: J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995), J. Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" *Political Theory* 29/6 (2001), 766-81, J. Habermas and W. Rehg, *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy*, (London: Polity, 1996), A. C. MacIntyre, *After Virtue : A Study in Moral Theory*, (London: Duckworth, 1981).

such as America, Australia, Italy, and the UK, antidemocratic entities decide the political agenda. Like Habermas, Tully points out that the solution to these problems is the enlargement of the individual's participation in the democratic process. Ideally – he explains – political choices, which affect all, should be decided with the direct participation of the whole community. “*In theory, ‘Quod omnes tangit’* [Italic in the original text] (*what touches all must be approved by all*), one of the oldest principles of western constitutionalism, has been revived and given a variety of multilogical reformulations as a principle of democratic legitimacy.”<sup>244</sup> This high level of political participation can be achieved only by adopting a procedural template of democracy – and relinquishing the present day one. This is the only solution which can shield the political arena from the abuse of antidemocratic entities which hijack the political agenda by imposing the protection of supposedly collective interests.

#### B) THE DIFFERENCE BETWEEN TULLY'S POLITICAL THEORY AND HABERMAS' DELIBERATIVE DEMOCRACY

There are two normative differences between Tully's and Habermas' account of the role of nationalism in modern democracy. First, Tully conceives his theory of democracy as a procedural theory in which formation of a political consensus over the solution of a political issue does not to aim to achieve, as Habermas does, universal and

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<sup>244</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.p.24



unquestionable “truth”. Second, Tully makes clear that modern society is composed of an ensemble of national identities. In contrast with Habermas, these identities have to be constitutionally recognised. Let us start to explain the detail of the first point.

*“If attention is focused primarily on the activity of democratic struggle over recognition in context, one can see why no resolution in either theory and practice is definitive. Any proposed resolution will harbour elements of non-consensus and injustice, and thus must be open to further democratic dissent and renegotiation.”*<sup>245</sup>

This idea of “reversibility” of previous political decisions which is central to modern democracy shows the normative limits of attaching universalistic claims to constitutional norms. This is the complete opposite of Habermas’ idea of communicative democracy where procedural rules, such as the equality of the speakers and the acceptance of the best argument, secure the so-called epistemological veracity of political decisions which might be transformed into constitutional norms.<sup>246</sup> Instead, Tully argues that constitutional norms

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<sup>245</sup> J. Tully, “Struggles over Recognition and Distribution.” *Constellations* 7/ (2000), 469-82p.474

<sup>246</sup> J. Habermas, *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy*, (Cambridge: Polity Press, 1996), J. Habermas, *The Theory of Communicative Action*, (London: Heinemann, 1984).

- even if they are the result of a communicative interaction - have no universal value and they should be open to possible revision.<sup>247</sup>

*“Critical analyses should proceed beyond agreement because the agreement and the normative models of its assessment will always be less than perfect, partial, subject to reasonable disagreement, and dissent will likely break out in practice and theory, reigniting the process.”<sup>248</sup>*

For Tully the democratic process is a practice which only *aspires* – but unavoidably fails - to find normative truth.<sup>249</sup> However, Habermas regards the political arena as the epistemological engine which can make universally accepted political decisions which can then be transformed into legal norms. These norms can – as Habermas explicitly states in his theory of constitutional patriotism - exclude political entities from the political arena.

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<sup>247</sup> In his ‘Between facts and Norms’ Habermas too accepts the possibility of reversing a democratic decision. However, he distinguishes the law-making process from the evaluation of norms, such as the protection of Human Rights and the exclusion of nationalism. At first sight the reasons for this separation are historical, but we saw in the previous chapter that it has to do with the idea that a legal system is a collection of rational decisions which can be assembled and dismantled. For instance, a decision taken after an ideal political debate to allow biological experiments in space might be changed if there is a change to the situation which allows the initial liberal approach. However, Habermas suggests that we have enough historical evidences for considering nationalism a risk for democracy. I explained that this idea is internally precarious and democratically dangerous. There is no such thing as the universal values of a cosmopolitan law and the adoption of these rational norms would endanger cultural diversity.

<sup>248</sup> He continues: “Any normative model of procedures or agreements will harbour elements of exclusion and assimilation and so will have to be continually tested against its capacity to throw light on deliberations in practice against the others models in theory” J. Tully, “The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy.” *Modern Law Review* 65/2 (2002), 204-28p.227

<sup>249</sup> The impossibility of finding “truth” is not a limitation in a political theory since disagreements over previous political decisions support the political discussion and with it democracy.

In contrast to Habermas, Tully explains that by limiting the democratic debate, we add restrictions to the democratic process which cannot be rationally accounted for. Tully makes clear that in a multinational society the communicative practice of discussing political decisions cannot be limited aprioristically by procedural rules. He argues that if a political theory wants to be democratically coherent it must consider the democratic practice as a normative priority.

The second normative difference between Habermas' and Tully's account of the role of nationalism in modern democracies has to do with the role play of national identities in modern constitutional law making. In contrast with Habermas, Tully's constitutional multinationalism considers a nationalist movement to be like any other entity struggling for recognition within a certain community. This interpretation of the role of political entities in a democratic debate has normative effects. It separates nationalism, as a social movement which attempts to obtain political recognition, from its political claims. Tully points out that even a rejection of political claims (which can be antidemocratic) cannot stop the process of self-recognition of a political stance since the practice of discussing, contesting and recognizing political claims has a normative priority

over universalistic claims.<sup>250</sup> This inverts the presuppositions which underpin Habermas' constitutional patriotism.

The most important element in Tully's view of democracy is keeping political debate alive, not the search for which decisions bear universal values and can therefore be inserted into a theory. In other words Tully reads the political dialogue as a normative priority and from this he concludes that national identities should be free to interact with other political groups. Building on this idea, he suggests that democracy is a critical activity in which the actors themselves are the subjects of its effects. Obviously, the exclusion of a national identity impoverishes this critical activity, but more importantly it breaks the linkage between the outcomes of the political debate and those subjected to them. By losing the linkage between discourse and *demos*, legitimacy becomes the antidemocratic reproduction of previous political decisions and a national identity cannot but feel unrepresented by *its* constitutional system.

#### C) MULTINATIONALISM: A NORMATIVE ELEMENT OF MODERN DEMOCRACY?

Tully argues that national identities should be considered as essential elements of modern democratic society. From this point, he draws that

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<sup>250</sup> "The principle of democracy (or popular sovereignty) requires that, although the people or the people who comprise a political association are subject to the constitutional system, they, or their representatives, must also impose the general system on themselves in order to be sovereign and free, and thus for the association to be 'democratically' [Italic in the original text] legitimate. The sovereign people or peoples 'impose' the constitutional system on themselves by means of having a say over the principles, rules and procedures through the exchange of public reasons in the democratic practice of deliberation". J. Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy." *Modern Law Review* 65/2 (2002), 204-28

a modern constitution should acknowledge these political groups. The acknowledgement of the participants in a debate is a logical requirement of the discussion that can be easily overlooked for those who consider the state population to be a homogeneous group of people, but it is only by accepting that modern society is multinational that we can have a representative democratic debate. This might drag back our discussion to the relationship between multiculturalism and multinationalism (chapter 1), but let us not derail our discussion here; the acceptance of multinationalism is an inescapable consequence of democracy since it opens the debate to all the political entities which form our polity.

The idea of legally recognising a national identity is often perceived as the first step of sending the state down the path of segregation (i.e. Habermas<sup>251</sup>), but this fear is unproved. Tully explains that the most common political claim of modern national groups is not independence and state sovereignty, as it is widely assumed, but the reconfiguration of the existing constitutional associations. This connection between independence, which in the modern world is a chimera for any state,<sup>252</sup> and national aspirations is due to the overlapping of meaning between national and state sovereignty.

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<sup>251</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27, J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001).

<sup>252</sup> Commercial relationships and international treaties bind all states to respect some form of international orders. This pragmatically and theoretically limits ideas of absolute sovereignty, such as those proposed by Schmitt, to academic discussions.

*"This classic understanding of the freedom of self-determination has been called into question and discredited by the persistence of struggles for recognition in the very societies which were until recently legitimated by it, for the struggles demonstrate that the constitution is not acceptable for all. As a result, the question of the freedom of self-determination is raised anew. It is raised in the context of multinational societies whose members have passed through the experience of struggles over recognition and learned that these do not admit a definitive solution."*<sup>253</sup>

Even if this belief is historically inaccurate, individuals have the tendency to understand democracy as a technical apparatus for finding political solutions within a single national community.<sup>254</sup> This misunderstanding of the relationship between national population and democracy transforms the constitutional systems of modern states into an 'empire of uniformity'.<sup>255</sup> *"The first feature of modern*

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<sup>253</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.p.6

<sup>254</sup> Weiler is one of many authors who grounds his constitutional theory on the uniformity of the state's population J. H. H. Weiler, The Constitution of Europe : "Do the New Clothes Have an Emperor?" and Other Essays on European Integration, (Cambridge: Cambridge University Press, 1999), J. H. H. Weiler, "The Promised Constitutional Land." Kings College Law Journal 12/1 (2001), 5-16

<sup>255</sup> J. Tully, Strange Multiplicity : Constitutionalism in an Age of Diversity, (Cambridge: Cambridge University Press, 1995). p.10-11; 58- 70. A similar point is made by Negri and Hardt. They argue that historically and theoretically there is a direct link between nationalism and fascism. However, while their idea is supported by an historical interpretation of the connection between nationalism and fascism which might easily please the cosmopolitans, it is theoretically similar to the one proposed in Habermas'



*constitutionalism comprises three concepts of popular sovereignty* [The uniform political association of free individuals, the individuals' recognition of the legitimacy of the constitutions, and the unquestioned moral validity of its norms] *which eliminate cultural diversity as a constitutive aspect of politics.*"<sup>256</sup> This misinterpretation of the relationship between identity and democracy creates a tension between those who demand recognition of their national identity and those who refuse this claim on the ground that it is theoretically incompatible with a constitutional state. "*Consequently, multinational democracy appears to run against the prevailing norms of legitimacy for a single-nation democracy and it is condemned as unreasonable or abnormal by both the defenders of the status quo and the proponents of secession.*"<sup>257</sup>

This aprioristic refusal of the role of nationalities in modern society makes the state illegitimate.<sup>258</sup> The effect of this unreasonable denial of nationalism is particularly evident in the classical liberal interpretation of cosmopolitanism. Tully explains that liberal societies consider the constitutional recognition of a national identity to be theoretically incoherent with the egalitarian principle. "*Modern constitutionalism developed over the last four centuries around two main forms of*

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constitutional patriotism which I criticized on the first part of this thesis (chapter 1-3). This point is made in: M. Hardt and A. Negri, *Empire*, (Cambridge, Mass. ; London: Harvard University Press, 2000). A more specific analysis is in a section which was not included in the original version but was later published.

<sup>256</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995).p.63 [My Emphasis ].

<sup>257</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 1-35.p.3

<sup>258</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995).p.16

*recognition: the equality of independent, self-governing nation-states and the equality of individual citizens.*"<sup>259</sup> In a legal system in which all individuals are equal there is little space for the political claims of a group which asserts to be different. Next, cosmopolitans argue that granting a special *status quo* to one of the national groups affects the state's political stability since other groups might consider themselves unfairly treated.

"[W]hen forms of multinational federalism are advanced as solutions to some of the demands of cultural recognition, they appear 'ad hoc', even as a threat to democracy, equality and liberty, rather than as forms of recognition that can be explained and justified in accordance with the principles of constitutionalism."<sup>260</sup>

However, the ruling out of claims related to the protection of national identities transform a constitutional theory into a homogenising ideology which exploits and destroys cultural diversity.

#### D) THE CONSTITUTIONAL RECOGNITION OF NATIONAL IDENTITY

In a nutshell Tully argues that the unreasonable refutation of multinationalism by modern constitutional theory denies the political role of national groups and this breaks the link between *demos* and the

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<sup>259</sup> Ibid.p.15

<sup>260</sup> Ibid.

democratic practice. He makes clear that the theoretical solution to this problem is to consider the struggle for recognition of national identities to be part of the democratic practice of contesting and understanding previous political decisions.

*“A contemporary constitution can recognise cultural diversity if it is received as what might be called a ‘form of accommodation’ of cultural diversity. A constitution should be seen as a form of activity, an intercultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiated agreement on their forms of association over time in accordance with the three conventions of mutual recognition, consent, and cultural continuity.”<sup>261</sup>*

If the struggle for recognition were inserted into the democratic process, it would change its function from an act of protest to a step toward the amendment of the constitutional norms. *“The way to break with the convention is to discover a post-imperial dialogue, [...] in which the interlocutors participate in their diverse cultural form of intercultural understanding which does not presuppose a compressive dialogue [such as the one supported by a classical understanding of the concept of nation-state].”<sup>262</sup>* If we abandon the concept of nation-

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<sup>261</sup> Ibid.p.31

<sup>262</sup> Ibid.p. 57 (My emphasis)

state, the demands of national groups become expressions of political freedom which might be channelled into constitutional norms. However, recall that democracy is perpetuated by the decisional practice which leads to the formation of constitutional rule, not by norms. It is precisely for this reason that federalism, confederation and regionalism do not represent a solution to the problematic relationship between the concept of nation, democracy and legal system.

*“It [the question of freedom] is raised in the context of multinational societies whose members have passed through the experience of struggles over recognition and learned that these do not admit a definitive solution (and so cannot be accommodated within the classic understanding of self-determination). Rather, these contexts constitute an enduring dimension of modern politics: the public disclosure of misrecognized identities and the demand that the other members acknowledge these and respond.”*<sup>263</sup>

With this, Tully separates liberal universal values, which he considers the meta-theoretical foundation of democracy, from the legal system whose function is to register the decisions taken within the political

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<sup>263</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.p.6

arena.<sup>264</sup> The linkage between these two elements constitutes what Tully calls the 'the third dimension of the constitution'.<sup>265</sup> This third dimension gives a right for any individual to demand the recognition of her/his identity and a duty for other members of the community to answer.

*"Each member must possess this right to initiate rule change and the correlative duty to acknowledge and answer, if the society is free and democratic. [This] follows from the 'democratic principle'. As a consequence, a free and democratic society is involved in a 'continuous process of discussion', a process which includes both the right to voice dissent and the duty to 'acknowledge and address those voices in the laws by which all in the community must live'."*<sup>266</sup>

Tully makes clear why the acknowledgment of the demand of recognition of national identities is a general obligation for any democratic community which wants to maintain the linkage between legal system and people(s). The dynamic of this relentless practice of recognition of national identities is already present in many

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<sup>264</sup> I will explain in the next section that my interpretation of multinationalism does not link democracy to liberal values, but for now let us continue on our analysis of the relationship between the recognition of national identity and democracy.

<sup>265</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.p.13

<sup>266</sup> Ibid.in ed/s p.14 (My emphasis).

constitutional democracies, such as Canada, Belgium, Switzerland, etc., but its normative impact in modern democracies is limited to proposed constitutional answers, such as the adoption of a federal system.

I explained in previous chapters that the normative importance of this practice of discussing the rule of recognition is downplayed by cosmopolitans, such as Habermas, who restrict their account of the recognition process to constitutional responses. This creates the false assumption that constitutionalism can provide definitive solutions to the issues related to multinationalism. However, Tully explains that this search for definitive constitutional answers to the demand of recognition creates new dissenting voices which generate new inputs into the process. Instead of seeking a panacea for the never-ending growing demands of acknowledgement – Tully concludes –, constitutional lawyers and political theorists must accept that the dynamic process of constitutional recognition of national identities is a constant element of any democratic community.

#### E) THE DIFFERENT STAGES OF THE PROCESS OF CONSTITUTIONAL RECOGNITION.

Let us see how demands of recognition are inserted into our constitutional democracies. Tully explains that a demand of recognition of a national identity has four features.<sup>267</sup> Firstly, it

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<sup>267</sup> “The demand involves the claim that, (1) the present form of constitutional recognition of their identity constitutes a non-recognition or mis-recognition, (2) this state of affairs constitutes an injustice,



presupposes that an individual considers himself or herself not recognised by the constitutional structure of the polity in which he or she lives. Secondly, this 'non-recognition' should be unjust. Thirdly, the amendment of this injustice must be supported by a public debate. Fourthly, the debate over the unfair 'non-recognition' of a national identity creates social cohesion among those involved in the discussion.

It is important to notice that the traditional understanding of the relationship between a sovereign state and its population unreasonably simplifies the demand of self-recognition of a national identity to a practice of exclusion and strategic protection of political interests. On the one hand, those who support the universal values they claim are embedded in a constitution protect their *status quo* by rejecting any demand which might alter the actual sociological and economic balance of the state. On the other hand, those who demand recognition of their identity reject the legitimacy of the constitutional system which unfairly fails to acknowledge their struggle for recognition. I argue that if modern democracy wants to break this deadlock, the process of evaluation of these claims cannot exclude the acknowledgement of the identity of who puts forward these demands.

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(3) the proposed new form of recognition is just and well-supported by public reasons (draw from the fourth dimension), and finally (4) recognition (and institutional accommodation) by the others members would render the overall constitutional identity of the society a just and stable system of social cooperation." Ibid.in ed/s p.15

This perspective has been recently acknowledged by the Canadian Supreme Court.<sup>268</sup>

The demand of changing the constitutional rules of recognition within a political community assumes different forms in relation to those who demand it. For instance, the demand of recognition of aboriginal people in Canada – as the original inhabitants of the territory now administrated by the Canadian federal government – is different from the claim of independence of Quebec. However, independently from the type and the identity of who puts forward these claims they should be acknowledged by all parties who are affected by the proposed changes. This will give them the occasion to enter the negotiation process that acknowledges the role of a group within a democratic community.

This process which Tully calls *identity discussion and formation*<sup>269</sup> is composed by three discursive stages. Firstly, if a group wants to change the rules of recognition of a democratic community - for whatever reason - it has to show to the rest of the community that the majority of its members think that they are misrepresented by the legal system. Thus, the first stage in a process of recognition of an identity is always an internal debate. Tully proposes as an example the debate within the French speaking community in Canada over the role of the

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<sup>268</sup> D. Scheneiderman, The Quebec Decision, (Toronto: Lorimer, 1999)., Reference Re the Secession of Quebec, 1998. Supreme Court of Canada.  
Available: [http://www.lexum.umontreal.ca/cscscc/en/pub/1998/vol2/html/1998scr2\\_0217.html](http://www.lexum.umontreal.ca/cscscc/en/pub/1998/vol2/html/1998scr2_0217.html).paras. 86, 91,95

<sup>269</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.p.17

Québécois identity. Secondly, the members of the group demanding recognition should start the debate with members of other identities since an amendment of the rules of recognition would change the role of national identity in the whole community. This phase is crucial for us. It is here where nationalistic claims are discussed and where legal issues emerge. It is in this phase that many national communities find their claim aprioristically excluded since they challenge values and ideas such as state unity, the use of a common language and constitutional norms. We will go back to this point in chapter 5 but before going any further, I would like to make a remark. This will help the understanding of what follows. Here, Tully uses the term 'negotiations' as if it was synonymous with 'political discussion'. I will explain the effect of the connection between liberal values and legal institutions. For now let us simply say that the terms 'negotiation' and 'political discussion' are not synonymous and the procedure of acknowledgement of cultural differences cannot be – at least in my interpretation of multinational democracy - considered an interaction which aims to level injustices only by strategic mediation.<sup>270</sup>

Thirdly, the publicity of the referendum allows for the further enlargement of the debate about the recognition of a national identity. I concur with Tully that a referendum is not the final word in the

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<sup>270</sup> Similar point are made by the well known Communitarian critique of liberalism. See for Instance: C. Taylor, "The Liberal-Communitarian Debate", in ed/s N. L. Rosenblum, *Liberalism and the Moral Life*, (Cambridge, Mass.: Harvard University Press, 1989), C. Taylor and A. Gutmann, *Multiculturalism and "the Politics of Recognition" : An Essay*, (Princeton: Princeton University Press, 1992).

procedure of self-recognition. Referendum is one of the processes which leads to the recognition of a national identity. The publicity of the referendum will extend beyond the community in which this form of direct democracy takes place. Groups which are not directly affected by the proposed changes might adopt a similar proposal and start the process of changing their rules of self-recognition within the larger community in which they live.

#### F. CONSTITUTIONAL MULTINATIONALISM: A MODEL FOR MODERN DEMOCRACY?

Modern society is multinational. This is an axiological element of modern life<sup>271</sup> which needs to be recognised in a legal system which aspires to maintain a linkage between the apparatus of the state and the population. Tully provides a decisive argument in support of this point. I am less sure about the process which he suggests as a model for recognising national identities. I agree with Tully when he argues that there is no such thing as an 'original national identity' which the community tries to promote, as some nationalists want to believe. Instead nationality is a process in which members of the national group and aliens define themselves in relation to each other. The interaction which results from the process of struggling for - and

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<sup>271</sup> If we accept Smith's analysis of the transformation of the concept of the tribe into the nation (A. D. Smith, Theories of Nationalism, (London: Duckworth, 1971), A. D. Smith, The Ethnic Origins of Nations, (Oxford: Basil Blackwell, 1986).), multinationalism has always been associated with democracy from its first recorded forms, such as that of ancient Greece, to its current interpretations. See on this point: Aristotle, The Athenian Constitution, (Harmondsworth: Penguin, 1984), M. Grant, The Rise of the Greeks, (London: Weidenfeld and Nicolson, 1987), D. Heater, Citizenship. The Civic Ideal in the World History, Politics and Education, (London: Longman, 1990). However, this hypothesis is part of an ongoing debate and I explained that the relativistic nature of historical analysis makes it unsuitable for supporting or denying substantive claims. .

against - recognition is multilogical and multiform. A political theory cannot procedurally or substantially restrict this process by setting the criteria which define a national community without breaching the normative connection between *demos* and democratic self-determination. The process of recognition is an internal never-ending process. The internal dynamic complexity of a national identity is reflected in the mutability and the unpredictability of its political claims. The volatility of the political demands of national groups affects the relations between national identities and constitutional norms. In contrast with authors such as Canovan<sup>272</sup> and Miller<sup>273</sup> who claim that the political stability of the modern state is related to the fact that individuals share a common national identity, national identities are in constant mutation and the state cannot draw political strength from any of them without losing its political stability. Instead, a theory of multinationalism argues that the political vigour of the community is connected to its ability to link its constitutional norms to all its socio-political identities. This function is guaranteed by acknowledging diversity.

I also concur with Tully when he explains that in a multinational society the struggle for - and against - constitutional recognition of a national identity is an 'agonistic' political activity. Members of a national identity support a procedure of constitutional recognition of

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<sup>272</sup> M. Canovan, *Nationhood and Political Theory*, (Cheltenham: Edward Elgar, 1996).

<sup>273</sup> D. Miller, "Bounded Citizenship", in ed/s R. Dannreuther, *Cosmopolitan Citizenship*, (Basingstoke: Macmillan, 1999),



their status in order to make a public display of the unfairness of the existing form of recognition.<sup>274</sup> Referring to the works of authors such as Arendt and Foucault,<sup>275</sup> this practice is part of the wider procedure of highlighting discrepancies and injustices within a political community.<sup>276</sup> The presence of a component of chronic disagreement among the members of a culturally diversified society is a normative factor of democracy since it is discontent over previous political choices which underpins the democratic debate. The impossibility of creating a universal consensus over a process of recognition of a national identity is one of the elements which sustain the democratic process. This continuous contesting and mutual disclosure and acknowledgement are also ends in themselves. *"They are the activity of democratic freedom itself, of participation in accordance with the rules laid down by the last struggle for recognition."*<sup>277</sup> Tully points out that the activity of acknowledging national identity not only pragmatically discharges the resentment of those who do not feel represented in the constitution, but also – and more importantly for us – it supports the democratic activities which create temporary agreements over moral and political issues. These activities have been

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<sup>274</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.

<sup>275</sup> Tully refers to H. Arendt, Between Past and Future : Eight Exercises in Political Thought, (Harmondsworth: Penguin, 1977). H. L. Dreyfus and P. Rabinow, Michel Foucault : Beyond Structuralism and Hermeneutics, (Brighton: Harvester, 1982).

<sup>276</sup> "The mutual disclosure and acknowledgement of the contests falls short of full constitutional recognition. What is disclosed in any given contest over recognition is partial and revisable, and the form of acknowledgment and response by other members is equally partial and revisable in the future." J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35. p.21

<sup>277</sup> Ibid.in ed/s p.22



relatively overlooked because theorists and practitioners have tended to presume that a community should have some moral aims, and democracy is one of the means for achieving these intentions. Theories of justice, usually universal in intent see the recognition of national identity as something to overcome.<sup>278</sup> However, the divisions over a politic of recognition of identity feed into the democratic debate.

Starting from this assumption, Tully suggests that we should adopt a more neutral process - such as the one proposed by Laden - for the political recognition of national identity.<sup>279</sup> This idea begs questions such as: what constitution does Tully envisage? Should a modern constitution aprioristically certain liberal values? Are these values neutral *vis a vis* the process of constitutional recognition of national identity? Answering these questions will be the theme of the next chapter.

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<sup>278</sup> J. Tully, "Struggles over Recognition and Distribution." *Constellations* 7/ (2000), 469-82 p.478

<sup>279</sup> A. S. Laden, "Outline of a Theory of Reasonable Deliberation." *Canadian Journal of Philosophy* 30/4 (2000), 551-80, A. S. Laden, *Reasonably Radical : Deliberative Liberalism and the Politics of Identity*, (Ithaca: Cornell University Press, 2001).

## CHAPTER 5

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### THE LIMITS OF TULLY'S

### MULTINATIONALISM

#### THE EFFECTS OF CONSIDERING DEMOCRACY A NORMATIVE PRIORITY

In the previous chapter, I explained that the recognition of national identity is an essential element of modern pluralistic society. However, this assumption seems incompatible with Tully's idea of adopting Laden's distinction<sup>280</sup> between political and social recognition. Laden argues that liberal values can be used for dividing reasonable political claims from social demands. This allows the separation between individual political identity, which can be accepted in a democratic debate and social identity which might be tolerated but is politically insignificant.

In this chapter, I will argue that the linkage between the process of self-recognition of national identity and democracy cannot be normatively anchored to liberal values.<sup>281</sup> I will do that by comparing

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<sup>280</sup> A. S. Laden, *Reasonably Radical : Deliberative Liberalism and the Politics of Identity*, (Ithaca: Cornell University Press, 2001).

<sup>281</sup> I have to stress again that it is not on the aims of this thesis to propose a critique of liberalism. The point I will try to make is that liberalism cannot provide the criteria for deciding which political stance should be legally recognised.

the normative basis of modern democracy and political liberalism.<sup>282</sup> I will make clear why a theory of multinational democracy cannot aprioristically adopt liberal values for distinguishing part of our identities. By adopting Laden's reasonable radicalism, Tully supports a constitutional system which reproduces liberal values instead of democratically retrieving political solutions.<sup>283</sup>

## 1. THE NORMATIVE BASIS OF COMMUNICATIVE DEMOCRACY

### A) THE DISCURSIVE PRACTICE

In the introduction I suggested that Tully's idea of adopting Laden's political liberalism is incompatible with the basic principles of modern democracy. This claim begs the question what is the basis of democracy. A clear account of the element of modern communicative democracy is provided by Tully himself. In his early works, he makes clear that a modern liberal constitutionalism cannot provide a template for a democratic society. He uses the term 'empire of uniformity' to describe the antidemocratic effects of the liberal constitutional tradition on a pluralistic society.<sup>284</sup> To make his point clearer he

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<sup>282</sup> Tully acknowledges the problems of political liberalism [J. Tully, Strange Multiplicity : Constitutionalism in an Age of Diversity, (Cambridge: Cambridge University Press, 1995).p. 44-45; 63-66. 55.]. However, in his theorisation of multinational democracy he accept that Laden has solve the issues which made liberalism unsuitable for a multinational state. A. S. Laden, "Outline of a Theory of Reasonable Deliberation." Canadian Journal of Philosophy 30/4 (2000), 551-80, A. S. Laden, Reasonably Radical : Deliberative Liberalism and the Politics of Identity, (Ithaca: Cornell University Press, 2001)..

<sup>283</sup> Similar point is made by : E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society." European Law Journal 9/4 (2003), 4001-432

<sup>284</sup> J. Tully, Strange Multiplicity : Constitutionalism in an Age of Diversity, (Cambridge: Cambridge University Press, 1995).Ch.3

proposes the example of aboriginal people in Canada, Australia etc.<sup>285</sup>

In his 'Political Philosophy as a Critical Activity',<sup>286</sup> he argues that the problematic relation between democracy, national identities and politics cannot be solved by a single minded normative template; instead we should adopt a more theoretical approach. However, the possibility of finding a more general political model is seriously limited by the way in which people interpret general terms. He argues that if a theory wants to assume the *status of a political theory* a common template has to be critically surveyed.

The first phase is a critical account of the 'language' used for supporting a theoretical solution to a political problem. Here, Tully uses the term 'language' as synonymous for the theoretical framework which a theory adopts for supporting its normative solutions. For instance, Habermas' constitutional patriotism accepts the 'language' of republicanism for proposing an alternative to the national state which denies any political space for nationalistic claims. Quoting Wittgenstein's philosophical analysis<sup>287</sup>, Tully explains that the use of general terms to describe political issues changes in relation to the context in which these terms are used. In our example of Mr. Levi's land, terms such as rationality, reasonableness, faith and truth, have a

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<sup>285</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35. p.8 and successive. See also: J. Tully, Strange Multiplicity : Constitutionalism in an Age of Diversity, (Cambridge: Cambridge University Press, 1995).

<sup>286</sup> J. Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy." Modern Law Review 65/2 (2002), 204-28, J. Tully, "Political Philosophy as a Critical Activity." Political Theory 30/4 (2002), 533-55, J. Tully, "Mouffe, the Democratic Paradox." Political Theory 30/6 (2002), 862-64.

<sup>287</sup> J. Tully, "Political Philosophy as a Critical Activity." Political Theory 30/4 (2002), 533-55 p.542 quotes Wittgenstein: L. Wittgenstein and G. E. M. Anscombe, Philosophical Investigations-, (Oxford: Blackwell, 1968). pp. 81-85

different meaning in the secular mind of Dr. Saliba and religious world of Mr. Levi. The attempt to impose a theoretical solution, which adopts general terms used by one of the parties in the dispute is destined to fail since general terms change meaning in relation to the subjective back-ground of the person who uses them.

Tully argues that the problem of the plurality of meanings of general terms trickles down to the applications of these provisions. The pragmatic consequences of a subjective understanding of a general term provide a network of rules of action. *"We do not find a set of features that make us use the same word for all cases but rather an open-ended family of uses that resemble one another in various crossings."*<sup>288</sup> In the example of Mr Levi's land, Mr. Levi's rational interpretation of the Bible provides the reason for deriving Israeli's ownership of the land which was once ruled by King David, whereas Dr. Saliba considers his claims supported by the Ottoman legal system.

Tully would explain that the precarious relation between the different meanings of the general terms used by supporters of a comprehensive political theory makes these comprehensive proposals (the one which is based on a legalistic approach and the one which advocates a system of religious beliefs) unsuitable as political templates for a modern pluralistic society.

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<sup>288</sup> J. Tully, "Political Philosophy as a Critical Activity," *Political Theory* 30/4 (2002), 533-55p.543

*“The consequence [...] is that understanding political concepts and problems cannot be the theoretical activity of discovering a general and comprehensive rule and then applying it to particular cases, for such a rule is not to be found and understanding does not consist in applying such a rule even if it could be found.”<sup>289</sup>*

A political theory, I agree with Tully, should be capable of using general terms such as nation, identity, rights over the land, in various circumstances and be able to give reasons for and against this or that use.

*“Understanding a general term thus involves being able to give reasons why it should or should not be used in a particular case, either to provoke or to respond to a dispute, being able to see the strength of the reasons given against this use by one’s interlocutors, and then being able to give further reasons, and so on.*

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<sup>289</sup> Ibid. p.543



*This is done by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents, exchanging narratives and redescriptions, drawing attention to intermediate cases so one can pass easily from the familiar to the unfamiliar cases.*<sup>290</sup>

This discursive practice has the aim of disclosing political points of view and debating differences, not finding universal political solutions which undercut the political debate. This conclusion seems to have closed the door to any substantive theory, liberalisms included. However, Tully continues and argues that a critical analysis of the languages used by a political theory is only the first step in the understanding of a political theory. The second stage of a critical analysis of a political theory is the historical context in which it has been proposed.

#### B) TULLY'S HISTORICAL ACCOUNT

Tully argues that political theory should be aware of how it should be interpreted in an historical context. Again, the meaning of the word 'historical' should be understood in a broad sense. Historical analysis for Tully means a comparative account of how a theory might be inserted into the historical evolution of political theories. "*This*

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<sup>290</sup> Ibid. p.543

*historical survey has the capacity to free us to some extent from the conditions of possibility uncovered in the first step.*"<sup>291</sup> The historical surveys take into account the fact that political debates and political decisions are embedded in a chronological moment or - more probably - a historical period. Again, if we go back to our example of the relationship between Mr. Levi and Dr. Saliba, an analysis of the historical context provides information on the meaning of a political theory which seeks to solve the intricate relation between Israeli and Palestinians. For instance a theoretical analysis such as the one proposed by Margalit and Raz which supports the right of self-determination of Israel,<sup>292</sup> or the one made by Home<sup>293</sup> about the role of British colonial law on the construction of the land law system in Palestine have different meanings outside the historical context which defines the relation between Jews and Palestinians.

This difference has an obvious pragmatic impact on Mr. Levi's claims over the land of Dr. Saliba, but it also assumes significance at the theoretical level. Historical contexts are often taken for granted but they make the basis for defining political issues and providing temporary solutions. I concur with Tully when he argues that testing and discussing the historical elements of a theory provides new ways of looking at the problem and questions the criteria which historically have been used for solving it.

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<sup>291</sup> Ibid. p.534

<sup>292</sup> A. Margalit and J. Raz, "National Self-Determination." *Journal of Philosophy* 87/9 (1990), 439-46

<sup>293</sup> R. Home, "An 'Irreversible Conquest'? Colonial Land Law in Israel/Palestine." *Social & Legal Studies* 12/3 (2003),

*"[T]he historical surveys disclose the formation and historical contingency of this specific form of problematisation and practice and the different potential ways of organising this general kind of practice of governance that were not actualised. [They] thus provide the means to criticise and evaluate the practices and ways of thinking to which we are subject by comparing and contrasting them with possible alternatives."*<sup>294</sup>

He explains that a critical survey of the development of a political theory should highlight and contest its limits and open the debate over the possible alternatives. This interpretation of the role of history in political philosophy is different from the analysis proposed by Habermas which wants to substitute the modern theory of the national state – such as the one proposed by Schmitt -<sup>295</sup> with a normative proposal which supports a form of constitutional cosmopolitanism.<sup>296</sup>

In contrast with Habermas who attempts to extract normative principles from an historical analysis, Tully's historical account is a critical activity which questions the relationship between a theoretical

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<sup>294</sup> J. Tully, "Political Philosophy as a Critical Activity," *Political Theory* 30/4 (2002), 533-55p.549

<sup>295</sup> C. Schmitt, et al., *The Concept of the Political*, Rutgers University Press, 1976).

<sup>296</sup> As I mentioned in the first three chapters, Habermas historical analysis of the relationship between state and nation relies on Schmitt's idea of ethnically uniform political association. J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27. Next, Habermas argues that a rational reading of the historical evolution of constitutionalism makes nationalism irrational and it should be excluded from the political arena.

proposal and the historical moment in which this proposal has been made. For instance, an historical survey of the 'concept of political'<sup>297</sup> - Tully would argue – should focus on Schmitt's analysis of the problematic relation between liberal democracy and popular will in a Europe dominated by military and ideological dictatorships.<sup>298</sup>

The historical survey is a critical aspect of a political theory since it links the theory with the social and institutional context in which it is made. Tully dedicates the entire central part of his 'Strange Multiplicity'<sup>299</sup> to this task and he makes clear that modern constitutionalism did not recognize the connection between cultural diversity and democracy. He concludes that modern constitutional theories should be more aware of the linkage between identity and the legitimacy of constitutional norms.<sup>300</sup> From this idea, he deduces that the aim of a constitution is not to find a universal theoretical solution over political issues but to provide a theoretical space in which previous decisions are questioned. It is in this space that political entities, such as national communities, have the occasion to express themselves and to form their identity.

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<sup>297</sup> C. Schmitt, et al., *The Concept of the Political*, Rutgers University Press, 1976).

<sup>298</sup> "[T]he aim is [...] to disclose the conditions of possibility of this historically singular set of practices of governance and of the range of characteristic problems and solutions to which it gives rise." J. Tully, "Political Philosophy as a Critical Activity." *Political Theory* 30/4 (2002), 533-55p.534

<sup>299</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995). ch.3-5

<sup>300</sup> *Ibid.*p.17

In contrast with authors, such as Rawls,<sup>301</sup> who argue that this space of debate can be limited by the 'reasonableness and values', Tully explains that a aprioristic exclusion of political claims - or a political group - is detrimental to democratic practice and theoretically unjustifiable. These limitations of the political debate are irrational in a society which wants to maintain the connection between democracy and political practice.

*"The democratization of struggle over recognition is required not only by the reciprocal or mutual character of recognition, but also by the principle of democracy itself. As far as possible, the rules in accordance with which citizen recognize one another and govern themselves should be based on the agreement of the governed or their representatives.*

*Therefore, any amendment to these rules [...] should rest as much as possible on the discussion and agreement of those affected by it. If it is not, then their action is coordinated behind their backs, and they are to that extent unfree."*<sup>302</sup>

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<sup>301</sup> See for instance: J. Rawls, Political Liberalism, (New York: Columbia University Press, 1993), J. Rawls, A Theory of Justice, (Oxford: Oxford University Press, 1972), J. Rawls, "Justice as Fairness: Political Not Metaphysical", Philosophy and Public Affairs, 14 (3), Summer, 223-51." International Library of Critical Writings in Economics 97/1 (1998), 250-78

<sup>302</sup> J. Tully, "Struggles over Recognition and Distribution." Constellations 7/ (2000), 469-82p.475

Here, Tully does more than simply provide a decisive argument for the exclusion of single-minded theoretical solutions such as the ones proposed by liberalism; he argues that all political theory should give to democracy a normative priority. This means that it cannot aprioristically rule out claims without making itself antidemocratic. This is the crucial point of Tully's analysis. However, in his analysis of the relationship between multinational society and democracy Tully reinstates one of the latest interpretations of liberalism. This is problematic for a theory which advocates the priority of democracy over aprioristic assumption.

## 2. WHAT IS DELIBERATIVE LIBERALISM? RAWLS AND LADEN

Tully takes the connection between legitimacy, identity and democracy to a theoretical level by asserting that political philosophy must be a critical activity. He explains that exclusion and assimilation not only make a political proposal antidemocratic but theoretically incoherent. However, in his theory of multinational democracy Tully suggests the adoption of Laden's interpretation<sup>303</sup> of Rawls's political liberalism as theoretical template for reaching constitutional agreements between different identities within a political community.

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<sup>303</sup> A. S. Laden, Reasonably Radical : Deliberative Liberalism and the Politics of Identity, (Ithaca: Cornell University Press, 2001).



*“To investigate the features of a free, multinational democracy let us start (not uncritically) from the classic liberal account of a reasonably plural, free and democratic society presented by John Rawls, in ‘Political Liberalism’ (1996), and its careful and innovative extension by Anthony Laden, in ‘Reasonably Radical: Deliberative Liberalism and the politics of Identity’ (2001), to free and democratic, multicultural and multinational societies.”*<sup>304</sup>

This choice appears in direct opposition to the critical requirements he suggested in his previous works where he argues that Rawls’s political liberalism is democratically incoherent.

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<sup>304</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.p.8

*"The non-European peoples of the world will be recognised as equals only once they have abandoned their lawless ways and submitted to European markets and republican constitutions. Many more examples could be given. In 'Superior people: the narrowness of liberalism from Mill to Rawls', Bhikhu Parekh elucidates how these conventions inform Mill's political theory and his justifications of British rule and cultural assimilation in India and Quebec."*<sup>305</sup>

However, in 'multinational democracy', Tully seems keen to rescue the theory of political liberalism (or at least Laden's interpretation of it ). This prompts a list of queries on the compatibility between the democratic coherency of multinational democracy and liberalism. Has Laden managed to bypass the limits of Rawls's liberalism that Tully acknowledged in his 'strange multiplicity'? If so, how? We start answering this question by analysing the details of the relationship between Rawls's liberalism and democracy and then we analyse how Laden tries – but fails - to solve the tension between political liberalism and democracy.

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<sup>305</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*. (Cambridge: Cambridge University Press, 1995).p.81 See also: p. 106-7; 190 ; B. Parekh, "Superior People: The Narrowness of Liberalism from Mill to Rawls," *Times Literary Supplement* 35/02/1994 1994.

#### A) THE PRAGMATIC PROBLEMS OF POLITICAL LIBERALISM

We closed the previous paragraph with a series of queries; we will now answer the first: has Laden managed to bypass the limits of Rawls's liberalism? Tully makes clear that Rawls's liberalism cannot be considered as a democratic theory since it imposes a system of values which aprioristically excludes political entities from an active role in the polity. Even if Rawls<sup>306</sup> does not automatically demand the ruling out of political claims, the insertion of political liberalism as a template for finding agreements into a multinational democracy has the pragmatic effect of politically disarming entities which put forward intolerable claims. This imposes a political template, which undermines democracy and squeezes cultural diversity into the liberal grill of values and goods.

Why "intolerable" claims should not be aprioristically excluded? What makes a claim intolerable? Rawls distinguishes between unreasonable and reasonable political demands. To be **reasonable claims** must at least acknowledge some basic values, which he considers the pillars of any society. **Unreasonable claims** are tolerated in modern democracy, but those who propose them cannot expect that they will lead to the formation of statutes. At first sight this division seem perfectly acceptable since no one wants an unfair society. However, this has the

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<sup>306</sup> J. Rawls, "Justice as Fairness: Political Not Metaphysical", *Philosophy and Public Affairs*, 14 (3), Summer, 223-51." *International Library of Critical Writings in Economics* 97/1 (1998), 250-78, J. Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972), J. Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), J. Rawls, "The Idea of Public Reason", in ed/s W. Rehg, *Deliberative Democracy : Essays on Reason and Politics*, (Cambridge, Mass. ; London: MIT, 1997), 93-144, J. Rawls, "The Idea of Public Reason Revisited." *University of Chicago Law Review* 64/3 (1997), 765-808

pragmatic effect of excluding national groups which cannot manage to fit their political demands into Rawls's aprioristic set of values. This is a serious limitation in a political theory. On the one hand we have the political entities which flourish since they manage to link their political claims to the values protected by a liberal society. On the other hand, there are communities which cannot connect their claims to the values shared by the remaining part of the polity. The issue here is not only theoretical. Let us go back to our example of Mr. Levi and Dr. Saliba's land. Mr. Levi and Dr. Saliba find themselves debating the legitimacy of their rights over a piece of land. Both parties on the discussion link their respective claims to an aspect of their national identity. Dr. Saliba claims that the land belongs to him since his ancestors took it when its previous owner relinquished it. Instead, Mr. Levi claims that the legitimacy of his ownership is backed by the word of God. Following the procedure suggested by Rawls's political liberalism, Dr. Saliba's claim seems more reasonable than Mr. Levi's. This is, even, if we do not consider that Mr. Levi has bought his land from a fraudster.

This has to do with the procedure which liberalism suggest for accommodating disputes. Individuals should have the ownership of a minimum set of "goods", and the freedom to exchange these resources. Rawls and Laden explain that the ownership of these basic goods is an equivalent to a basic freedom since they are the basis upon which individuals start the bargaining process that allows the full

exploitation of their limited resources and the formation of political agreements. In addition to this form of liberty, there is the individual political freedom of accepting the conditions of association with other individuals. This form of freedom is the possibility granted to individuals to modify the procedures which allow the expression of their communal identity. If individuals distance themselves from their social positions, they will accept only improvements of their individual freedom which enhance the common good of the community.<sup>307</sup>

If we apply these criteria to the procedure which needs to find a solution to the case of Mr. Levi and Dr. Saliba's land the outcome is obvious. Given that the ownership and the possibility of transferring rights are considered a constitutive element of a liberal society, Dr. Saliba's claim appears immediately more reasonable than Mr. Levi's demand. This has to do with the fact that Dr. Saliba argues for the protection of his resources – and the right of maximizing them - which is a basic element of a liberal society, while Mr. Levi's propriety claims are related to a system of religious beliefs based on the beliefs of a particular sociological group. Rawls clearly explains that claims incompatible with a reasonable idea of justice should be tolerated – but not protected - only if they do not endanger the basic freedoms guaranteed by the original position.

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<sup>307</sup> Rawls argues that individuals should consider themselves in a hypothetical "original position" in which they do not know their place in society. In the original position the individual knowledge is protected by a screen which Rawls calls: "veil of ignorance". Behind the veil of ignorance, individuals have the right to protect the ownership of their basic goods and they should act as they do not know: their faith, sex, race, and natural abilities.

In his theory of justice<sup>308</sup>, Rawls explains that since it can never be to men's advantage to forego the right of self-protection then the question is whether the tolerant has the right to curb the intolerant to respect the system of rights which emerges from the negotiation process. Rawls argues that a fair society can properly force the priority of basic liberties which an individual would acknowledge in the original position over other claims. However, in the case in which these basic liberties are in danger, those who support intolerant claims should have their freedom restricted. In his *Political Liberalism*<sup>309</sup> Rawls tries to play down the possible effects of his procedural theory by stressing the effect of reasonableness in the decision making process which leads to political agreements. However, this does not redress the critique of Tully who denounces the homogenisation effect of aprioristically linking liberal values to a political theory and drives us to the crucial issue in this chapter: has Laden's radical liberalism managed to overcome the problems of Rawls's liberalism?

#### B) IS LADEN'S LIBERALISM ANY DIFFERENT FROM RAWLS'S?

The limitations of Rawls's analysis – which Tully openly acknowledged in his 'strange multiplicity'- of the relationship between communal identity and democracy were first pointed out by

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<sup>308</sup> J. Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972).

<sup>309</sup> J. Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993).



communitarian authors such as Taylor.<sup>310</sup> Tully argues in his strange multiplicity that Rawls political liberalism is an imperialistic instrument of cultural homogenisation.

*"To presuppose that the initial conditions of popular sovereignty are a state of nature, a veil of ignorance, a set of European traditions and institutions, or an already existing national community is to beg the question of the politics of recognition. It dispossesses Aboriginal peoples of their constitutions and authoritative traditions without so much as a hearing and inscribes them within the Eurocentric conventions of modern constitutionalism."*<sup>311</sup>

However, in the introduction to his 'multinational democracy', Tully refers to Laden's deliberative liberalism<sup>312</sup> as the template for finding political solutions. If we discharge the unsupported hypothesis that - in the period of time, which separated the two works - Tully has changed his mind about the effect of liberalism in a culturally diversified society, then we have to presume that he accepts Laden's reintegration of Rawls's political liberalism as an adequate procedural

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<sup>310</sup> C. Taylor and A. Gutmann, *Multiculturalism and "the Politics of Recognition" : An Essay*, (Princeton: Princeton University Press, 1992), C. Taylor, "The Liberal-Communitarian Debate", in ed/s N. L. Rosenblum, *Liberalism and the Moral Life*, (Cambridge, Mass.: Harvard University Press, 1989),

<sup>311</sup> J. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995).p.82

<sup>312</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 1-35.p.8

template for inserting nationalistic demands into the political arena. However, if Laden wants to rescue Rawls's political liberalism he must solve two distinct theoretical problems. Firstly he has to insert the recognition of the role of political identities into the deliberative process. Secondly, Laden's proposal should explain how a political liberalism can endorse the protection of liberal values and at the same time be democratically coherent.

Laden argues that social and political identities are elements of a theory of political liberalism and their political demands can be included in a society which upholds liberal values. "*Deliberative liberalism provides a strategy for thinking about political legitimacy in the face of deep diversity.*"<sup>313</sup> He argues that political claims can be inserted into reasonable political decisions which uphold liberal values without assimilation.

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<sup>313</sup> A. S. Laden, Reasonably Radical : Deliberative Liberalism and the Politics of Identity, (Ithaca: Cornell University Press, 2001).p.5

*"The theory makes three central claims: our political deliberation will confer legitimacy if it is reasonable; it can only be reasonable if we can identify ourselves in this manner if two conditions are satisfied: (a) no one has an aspect of their non-political identity imposed on them, and (b) full and active participation in political deliberation as a citizen does not unduly burden the occupation of nonpolitical identities. Deliberative liberalism is reasonably radical; its commitment to radical politics develops out of its commitment to reasonable politics."*<sup>314</sup>

With this argument, Laden makes a distinction between reasons which support a political claim and the identity which proposes it. He argues that reasonableness comes to play a role only on discussions over the validity of the reasons that support a claim, not on the social background of its source of it. Here, Laden suggests that members within different identities engage in political discussions and exchange reasons in order to make reasonable decisions. In this process, entities build up a *relationship*, which affects the way they assess reasons and this will eventually change the way they make political choices.

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<sup>314</sup> Ibid.

*“Whether or not one person has a legitimate claim on another may depend on the nature of their relationship. It will turn out that in many cases, whether something counts as a reason for the purposes of assessing the reasonableness of deliberation will depend on who is offering the reason to whom.”<sup>315</sup>*

However, considering the relationship between identities as an element in the formation of political agreements creates a theoretical problem on the evaluation of the reasonableness of political claims. Relationships are pragmatically flimsy and might be unjust. Let us take an example to make this point clearer. In the past hundred years, the relationship between Jewish settlers and Palestinian people not only has constantly changed but it has extended an unjust distribution of resources between the two communities which cannot be used as basis for supporting political claims.

Laden distinguishes two problems here. The first – which he calls: ‘practical flimsiness’- is the difficulty of accepting the validity of claims based on relationships instead of absolute criteria. He argues that this is a false problem since a person cannot be considered as an independent entity – such as some Kantian authors want to believe -

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<sup>315</sup> A. S. Laden, "Outline of a Theory of Reasonable Deliberation." Canadian Journal of Philosophy 30/4 (2000), 551-80p.558

and therefore his/her decisions are always made on the ground of her/his relation with others.

*“Highlighting the connection between relationships and identity brings the stability of the relationship to the fore. Just as I cannot just change my identity the way I can change my shirt, I cannot merely change the nature of my relationship by deciding to do so or declaring that I have.”<sup>316</sup>*

Going back to our example of Mr. Levi’s land, Laden would argue that a process of deliberation which involves Israelis and Palestinians cannot be based on universal categories since the members of both identities form their criterion of reasonableness in relation to the situation in which they find themselves.

The second problem that he calls the ‘normative flimsiness’ demands that a theory of political deliberation includes the criterion for finding relationships which have a political relevance. Laden argues that the choice of which relation is politically relevant to the formation of a political decision cannot be left to popular consensus since our psychological adaptability would make us, under the right circumstances, accept *any kind of regime*<sup>317</sup>. This possibility is reduced in modern constitutional states by the respect of substantive liberal

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<sup>316</sup> Ibid. p.571

<sup>317</sup> Ibid. p.572

values. However, the adoption of these values oppresses cultural diversity and enforces assimilation. Laden proposes his own solution to this problem. He argues that the political decision over a claim must be structured in such a way that the rejection or acceptance of the claim makes a difference.

*"Deliberations will need to satisfy this condition if they are to be reasonable. We will then be able to say that relationships within which reasonable deliberation is possible are reasonable, and that only reasonable relationships can group the normativity of claims."*<sup>318</sup>

He argues that members of different political identities who discuss and exchange reasons should not feel threatened by assimilation and this can be achieved only if all entities accept to relinquish aspects of their identity which reject other identities. *"If, then, the identity of citizen sits ill with some other aspect of my identity, then in order to take part in political deliberation I may have to abandon that aspect of who I am or what I value."*<sup>319</sup> Laden explains that the remaining aspects of an identity might contribute to the making of a political conception of citizenship which is constructed by the interaction

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<sup>318</sup> A. S. Laden, "Outline of a Theory of Reasonable Deliberation." *Canadian Journal of Philosophy* 30/4 (2000), 551-80p.573

<sup>319</sup> p. A. S. Laden, *Reasonably Radical : Deliberative Liberalism and the Politics of Identity*, (Ithaca: Cornell University Press, 2001).14



between myself and different identities. Thus, political citizenship is a deliberative process which allows the integration of the features which constitute the cultural diversity into the search of a common good.

C) LADEN'S POLITICAL CITIZENSHIP: HOW TO AVOID THE  
HOMOGENISING EFFECT OF LIBERALISM

The second problem in Rawls's proposal has to do with the homogenisation effect of adopting liberal values as criteria for finding reasonable political agreements. Laden starts by arguing that this critique is due to a misunderstanding of Rawls's procedure of forming a reasonable political conception.

*"Rawls has been criticized for his method on the ground that such a method fails to appreciate adequately the plurality of political deliberation. Such criticism fails to notice Rawls's claim that even within this method citizens are bound to disagree about the precise content of what they take to be the best political conception of justice"*<sup>320</sup>

To avoid being misinterpreted, as he claims Rawls is, Laden's proposes his own account of the relationship between the formation of reasonable political decisions and pluralism. It is important to stress here, the importance of the proposed solution to this issue since the

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<sup>320</sup> J. Rawls, Political Liberalism, (New York: Columbia University Press, 1993), J. Rawls, "The Idea of Public Reason Revisited," University of Chicago Law Review 64/3 (1997), 765-808

democratic coherence of Laden's liberalism - and Tully's theory of multinational democracy.- relies on the solution of the problematic relation between liberalism and democracy. Laden, like Rawls, argues that democratic society must protect some basic liberal values. However, both authors accept that the endorsement of liberalism is problematic in a democratic society.

*"According to democratic conceptions of citizenship, whatever citizens decide about the nature of the political system goes. For a conception of citizenship to be liberal, however, citizen must be bearers of certain inalienable rights and liberties. These rights and liberties are not up for debate in the political process. They thus appear to be beyond the reach of the collective power of citizens to change. In this way, liberalism appears to contain an antidemocratic element at its core, while unbridled democracy can serve to undermine liberal values"* <sup>321</sup>

The solution which Laden suggest to this problem is to interpret liberal values in the practice which forms what he calls our 'political citizenship'. He argues that liberal values are a *meta-theoretical*

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<sup>321</sup> A. S. Laden, Reasonably Radical : Deliberative Liberalism and the Politics of Identity, (Ithaca: Cornell University Press, 2001).p.112

*element of modern democracy* and they should be adopted as criteria for deciding which element of our identity can support a political claim. This will separate private identity from public identity. By separating public and private elements of our identity, we can exclude politically irrelevant sociological entities. However, this idea is far fetched.

Laden's deliberation process<sup>322</sup> is normatively and procedurally too "thick". Laden's liberalism transfers the homogenising effect of liberalism to another stage of the deliberative process. This moves the problem to another procedural phase in the formation of political agreement but it does not solve the issue of adopting aprioristic values as criteria in a process of recognition of national identity.

To make clear the details of this point, let us go back to our example of the discussion between Mr. Levi and Dr. Saliba over the ownership of an estate. As I explained, there is general perception that Rawls's political liberalism<sup>323</sup> cannot provide a political solution to the controversy such as the one between Mr. Levi and Dr. Saliba, but Laden would argue that the critiques of political liberalism are misplaced. He explains that Rawls's tenet would provide a solution to the conflict between two individuals who support two apparently irreconcilable claims without aprioristically imposing a system of

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<sup>322</sup> Ibid. p.195 -199

<sup>323</sup> See for instance the communitarian critique of Rawls: C. Taylor, "The Liberal-Communitarian Debate", in ed/s N. L. Rosenblum, *Liberalism and the Moral Life*, (Cambridge, Mass.: Harvard University Press, 1989),, C. Taylor and A. Gutmann, *Multiculturalism and "the Politics of Recognition" : An Essay*, (Princeton: Princeton University Press, 1992). See also: J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001).

values. Liberal principles, he argues, are criteria which work only on the formation of what Laden calls the deliberative construction of citizenship. An identity distinguishes its political elements from non-political features by this procedure. Given that this interaction has to respect the basic liberal values, such as freedom and equality, there is no need to use them again as criteria for the evaluation of the political claims proposed by the identity which already passes through this process. In our example the procedures that form Dr. Saliba's and Mr. Levi's political citizenship build - Laden would argue - a political identity which excluded unreasonable political claims. However, the effect on the political debate of Laden's political identity is the same from the one we would obtain if we had adopted Rawls's practice of overlapping consensus. Mr. Levi's reference to his religious beliefs cannot be part of his argument with Dr. Saliba since they are part of a non-political element of Israeli identity. Therefore, Mr. Levi cannot claim that he and his family are the God elected trustees of His holy land since this aspect is in blatant contrast with the principles of equality and freedom which Laden endorses as criteria on the formation of his political citizenship.<sup>324</sup> However, this conclusion, which might be possible and reasonable in Laden's terms, is antidemocratic and leaves Mr. Levi's identity unrecognised and politically excluded.

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<sup>324</sup> A. S. Laden, *Reasonably Radical : Deliberative Liberalism and the Politics of Identity*, (Ithaca: Cornell University Press, 2001).p.112

Laden does not realise that equality and freedom to intervene in the political debate are procedural elements of democratic deliberation, not criteria for differentiating reasonableness from unreasonableness. This is because what is politically reasonable is dynamically changing and must be democratically decided by political debate, not by an aprioristic endorsement of substantive values.

Laden is aware of the similarities between his concept of political citizenship and Rawls's overlapping consensus and he tries to prevent the same critiques that are directed to his proposal. However, even if Laden argues that neither he nor Rawls consider the respect of basic principles of reasonableness as criteria which individuals have to endorse when they propose their political claims, he does not grasp that in his theory this is the only way by which political demands can be inserted into the political arena.

*“Nothing in the ideal of public reason, as I understand it, prevents his arguing [Laden takes the example of a religious extremist civil rights activist] in terms of dignity rather than economic opportunity as the source of understanding the importance of civil rights. For the political deliberation to be reasonable, he must not rely in arguing for the importance of human dignity on premises that derives from his comprehensive doctrine alone, premises that he could not reasonably expect his fellow citizens to endorse as well.”<sup>325</sup>*

In his theory – such as Rawls’s proposal -, the proposed procedure has the direct effect of depriving these political claims from the possibility of being openly discussed. This effect is in direct contrast with the premises upon which Laden starts his proposal.

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<sup>325</sup> My Emphasis Ibid.p.120



*“Deliberative liberalism argues that truly shared will can only be embodied in and maintained by a reasonable political deliberation. Through what I call reasonable deliberation, people who do not have an identity in common can come to share an identity and thus a will. Grounding legitimacy in deliberative endorsement thus provides a means for establishing legitimate political principles without assuming uniformity.”<sup>326</sup>*

However, Laden’s idea of political citizenship formed by political interaction simply moves the homogenizing effect of liberalism to a different procedural stage in the formation of political agreement/s. Put simply, Laden does not realise that the democratic acknowledgement of what enters into the relationship between communicative process, cultural diversity and democracy demands the reiteration of any criteria of evaluation. This procedure cannot be adopted by a multinational society because it falsifies the process of recognition of national identity. This point is overlooked by Tully when he suggests the adoption of Laden’s radical liberalism as a template for modern democracy.

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<sup>326</sup> Ibid.p.14

D) THE RELATIONSHIP BETWEEN TULLY'S MULTINATIONAL  
DEMOCRACY AND LADEN'S DELIBERATIVE LIBERALISM

Once this discussion on the relationship between the protection of Human Rights and radical democracy is closed, we can conclude our debate over the effect of Laden's theory on Tully's multinationalism. In his "Political Philosophy as a Critical Activity", Tully explains that the relation between national identities cannot be limited by an aprioristic theoretical model without breaking the linkage between democracy and legitimacy. In his multinational democracy, he argues that political theory should focus on how national identities interact within a democratic community. Even if Tully does not go so far,<sup>327</sup> this analysis makes clear the indirect relation between democracy and nationalism. I concur with Tully when he argues that national identities with their demands of recognising and protecting the national community play a role – like all the political movements - in the deliberative process which is essential to democracy. As I pointed out earlier, the protection of the right of demanding the recognition of the national identity is normatively essential to a society in which there are different national identities only because their political activities are part of the recognition of cultural and political diversity. As a consequence, a denial of the right of acknowledging national identities would make a society democratically incoherent. However,

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<sup>327</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.

Tully's multinationalism does not embrace the full theoretical consequences of this analysis. Laden's theoretical model is inserted by Tully in his multinational democracy as a template for finding political agreements within the process of constitutional recognition of national identities.

*"Indeed, part of what makes a society free and democratic is reasonable disagreement among the members and their political traditions of liberalism, conservatism, socialism, republicanism, feminism, nationalism, environmentalism and so on (Rawls 1999, pp.140–3).*

*These principles, values and goods comprise the public, normative warrants members appeal to in exchanging reasons over the justice and stability of their conflicting demands for and against recognition in any case (Rawls 1999, pp.129-80; Laden 2001 chs.5-7)."*<sup>328</sup>

However, I pointed out that Laden's proposal is not a solution to the problems of Rawls's political liberalism. Laden's distinction between non-political identities and citizenship is precarious and the grid of values and goods remains the homogenising criterion for dividing

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<sup>328</sup> Ibid.in ed/s p.13

unreasonable from reasonable political claims. I explained that if we accept Laden's idea of inserting the relationship between identities into the process of evaluation of political claims, we would move the object of political accountability of a political demand from the claim to its formation of a public identity, but Rawls's system of values and goods remains the substantive – thus antidemocratic - criteria for aprioristically excluding political claims.

I also made clear that this theoretical reinterpretation of Rawls's liberalism does not give a better chance to a member of a national group – such as our Mr. Levi - of obtaining the political recognition of his identity; instead it simply moves the homogenisation effect it ought to overcome -to a different stage of the political debate. Once this effect is clarified, we can see easily that Laden's idea of political citizenship<sup>329</sup> is not different from Rawls's concept of overlapping consensus. Both tenets construct a theory in which the political interaction is based on unquestioned acceptance of the universal validity of liberal values. Next, they both use these values as a theoretical base for proposing a procedural theory which ought to give voice to the people who bear different identities. Finally, the theoretical system they propose simply reproduces the principles – the safeguard of basic liberal values - endorsed at the meta-theoretical level.

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<sup>329</sup> A. S. Laden, *Reasonably Radical : Deliberative Liberalism and the Politics of Identity*, (Ithaca: Cornell University Press, 2001), A. S. Laden, "Outline of a Theory of Reasonable Deliberation." *Canadian Journal of Philosophy* 30/4 (2000), 551-80

This template for a democratic society cannot be inserted into Tully's theory without breaking the connection between the process of recognition of national identity and democracy. I explained that multinational democracy relies on two axiological assumptions. First, all societies are multinational and pluralistic. The fact that we might find a community ethnically or culturally homogeneous – which is denied by anthropologists such as Gellner -<sup>330</sup> is a theoretical possibility, but this is irrelevant to the problem of democratically linking norms to people (*demos*). Identities are dynamic social elements which needs to interact with '*their*' legal system. This interaction presupposes recognition.

Second, the process of public recognition is a cardinal aspect of a legitimate democracy. The debate within a national community can be an internal discussion which does not have political implications apart from reinforcing the sense of sharing a common identity. In this case there is no need for legally recognising the group. The situation changes in the case of the national community having a political claim. In this case the community interacts with the rest of the population and needs to be acknowledged. The problem in this case is the extension of this acknowledgment. Is this acknowledgment only formal? Or can we accept that a national community has a juridical status which allows some derogations to the constitutional system? For instance can we conceive the possibility that a national

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<sup>330</sup> E. Gellner, Nations and Nationalism, (Oxford: Basil Blackwell, 1983), E. Gellner, Encounters with Nationalism, (Oxford: Blackwell, 1994), E. Gellner, Nationalism, Phoenix, 1998).

community may force its members to go to certain schools? Should we accept that a community demand unilateral secession?

Tully's answer to these questions is to adopt Laden's deliberative liberalism as the procedure for finding political solutions of the problems related to the recognition of the national community. However, the endorsement of Laden's radical liberalism undermines Tully's thesis.

Tully asserts that: "[T]he constitution includes '*the principles, values and goods*' [Italic on the original text] *that are brought to bear on the identification of members, the relations among them, and the discussion and alteration of their identities and relations over time.*"<sup>331</sup>

These systems of values and goods shared by the members of national groups are called into question during the process by changing the rules of recognition.<sup>332</sup> Adopting Laden's idea of reasonableness, Tully incoherently decreases the level of what is admissible in a democratic society, which is incoherent with his theoretical idea of political theory, and reduces the process of self-recognition to a possibility of having national claims tested against the liberal view. It is precisely this reluctance to let go of the liberal anchoring of democracy, that compromises Tully's multinationalism and that is the reason why his reliance is so problematic.

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<sup>331</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 1-35.

<sup>332</sup> Ibid. in ed/s p.13 E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society," European Law Journal 9/4 (2003), 4001-432



The endorsement of liberal values cannot be supported even at a pragmatic level by linking liberalism to the protection of the Human Rights. We might speculate that Tully is concerned with the protection of the rights of the Canadian minorities (the French speaking and the aboriginal people) and he wants to protect them by making a special case of his theory of political philosophy as a critical activity.<sup>333</sup> However, I would argue that Laden's political liberalism should respect the priority of the democratic practice, and - more importantly – should protect the political role of cultural diversity in a modern society. Adopting this procedural template of democracy, Tully diminishes the protection of minority rights and defends the *status quo* of the endowed majority. I want to argue that in order to conceive a theoretical model of the relation between democracy and nationalism, we must relinquish the assumption that the process of recognition of national identity can be channelled into a system of procedural rules which decide what is politically admissible and what is not. This more radical approach is the theme for next chapter.

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<sup>333</sup> J. Tully, "Political Philosophy as a Critical Activity," *Political Theory* 30/4 (2002), 533-55

## CHAPTER 6

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### OPEN DEMOCRACY AND THE RECOGNITION OF NATIONAL IDENTITY

What is the relation between nationalism and constitutional democracy? Is it possible – and if it is how – to channel the nationalistic claims in a legal system? In the first three chapters of the thesis (Charters: 1 – 3), I argued that nationalism and its claims contribute to the process which links *demos* to the legal system. In chapter four, I suggested that if a democracy wants to include nationalistic claims, it has to recognise the role played by national identities in modern society. In chapter five, I explained that the models of multinational society proposed by theorists such as Tully and Laden are still unsatisfactory. I argued that the process of constitutional recognition of national identity cannot be grounded on the aprioristic protection of liberal values, even in the less invasive form suggested by Laden. The aprioristic endorsement of liberal values allows the constitutional recognition of all national identities, but refuses to accept the political implications of it. However, should we aprioristically exclude some nationalistic claims, such as the right

of unilateral secession, since they are incompatible with basic democratic principles?

The answer I suggest is no. The democratic arena can be opened to any demand of recognition. I argue that the critiques which consider this idea ‘democratically dangerous’ or ‘normatively flimsy’ are in fact democratically inconsistent. Constitutional norms can be more than formally legal only if two normative conditions are satisfied: *all* political groups – and this includes national groups - can intervene in the political debate and *any* political demand can be discussed. Obviously, this does not mean that all claims will collect enough support to become a norm. However, it is only by discussing and reviewing individuals and group’s political inputs that we can attempt to knit a connection between *demos*, political decisions and statutes (*leges*). I will discuss this process in this chapter. In particular, I will discuss the pragmatic difficulties and the democratic risks associated with an open process of recognition.

#### 1. A PRELIMINARY ISSUE: SETTING THE LIMITS OF THE POLITY

There is a preliminary issue that has to be clarified before discussing the details of the process of recognition of national identity. Who is entitled to decide over the process of recognition? This question echoes the debate over the right of national self-determination of the nation.<sup>334</sup> However, discussing the problem of ‘who is entitled to

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<sup>334</sup> In the first chapter, I argued that national self-determination is no a solution to the problem of setting the limits of the political debate. On the one hand, nationalists do not want to put their trust on the

decide' over a political claim is a preliminary issue in *any* democratic debate which here does not have a specific reason to be discussed. In modern democracies, we assume that the democratic arena is composed by all politically active members of the community.<sup>335</sup> This presumption, which solves the preliminary problem of 'deciding who decides', is unquestioned in the great majority of the debates. For instance: the debate over the adoption of a norm which makes a medical vaccine compulsory for children does not normally bring into question the legitimacy of who is entitled to decide. It would be different, if the political debate were over the adoption of an official language in nurseries. In this case, a minority language group might challenge the legitimacy of a democratic decision on grounds that it is the only legitimate political group to decide such an issue.

The importance of 'who decides' is obvious when it radically changes the community's constitutional framework. For instance, the secession of Northern Ireland from the United Kingdom is decided by a referendum in Northern Ireland: *"1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the*

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principle of majority will that so often have endangered their identity. On the other hand, they cannot guarantee that they will not pursue the same policy against their internal minorities. This reproduces the same problem under a different banner, but this is a pragmatic point which should not prevent us from searching for a normative solution to the problem of setting the limits of the political arena.

<sup>335</sup> They are the ones who have a say over the political issues discussed in the political arena. Referendum is the only case in which citizens who are not Members of the Parliament directly intervene on the political debate. In all the remaining instances their political power is expressed indirectly. This activity ranges from the right to vote to the possibility of participating in political campaigns. In this last activity citizens might be supported by people who are not allowed to vote such as foreigners.

people of Northern Ireland.”<sup>336</sup> However, ‘who is entitled to decide’ is a general problem of any political debate, which is made more dramatic on the discussion over nationalistic issues. Going back to the example case of a compulsory vaccine for children, young parents might refuse the legitimacy of norms approved by a majority who do not have young children.

The more general implications of this point are discussed by authors such as Christodoulidis<sup>337</sup> and Ost<sup>338</sup> who point out the difficulties of combining norms which decide the limits of the polity and democracy.<sup>339</sup> However, the normative difficulties of deciding who is a legitimate actor in the political arena cannot be the supporting reason for aprioristically<sup>340</sup> denying claims which want to re-discuss the state’s political borders. This would mean undemocratically using a theoretical argument for stopping the practice of discussing political issues (Chapter 4). This idea is endorsed by the Canadian Supreme Court when it decides over the demand of unilateral secession of

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<sup>336</sup> 1998, The Northern Ireland Act 1998, 19 November 1998 Ch.47

<sup>337</sup> E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society." *European Law Journal* 9/4 (2003), 4001-432 See also: E. Christodoulidis, *Law and Reflexive Politics*, (Dordrecht: Kluwer, 1998).

<sup>338</sup> F. Ost and M. Van Hoecke, *Temps et Droit : Le droit a-t-il pour vocation de durer? Time and Law : Is It the Nature of Law to Last?*, (Bruxelles: Bruylant, 1998).

<sup>339</sup> Christodoulidis and Ost explain that the relationship between norms and democracy cannot be but paradoxical. They explain that independently from the process which drives to the formation of a statute, the validity of its norms can be contested by those subject by it. There are two reasons for this. First, statutes cannot be supported by a unanimous consensus. Someone will feel left out from the process and unrepresented by the values inserted in a norm. This exclusion will make norms democratically unrepresentative of part of the population. A similar point is made by Mouffe - C. Mouffe, "Deliberative Democracy or Agonistic Pluralism?" *Social Research* 66/3 (1999), 745-58, C. Mouffe, *The Democratic Paradox*, (London ; New York: Verso, 2000). -. Second, norms are providing some references for our society which try (but unavoidably fail) to keep up with the ever changing social contest which they want to regulate. This is the ‘time and law paradox’ F. Ost and M. Van Hoecke, *Temps Et Droit : Le Droit a-T-Il Pour Vocation De Durer? = Time and Law : Is It the Nature of Law to Last?*, (Bruxelles: Bruylant, 1998). Ost and Van Hoecke argue that society is a dynamic entity which cannot be chained in a legal norms without making these unrepresentative.

<sup>340</sup> Again The meaning of the terms a priori is the one suggested by : *Collin Cobuild English Language Dictionary*, (London, Collins LTD, 1990)

Quebec: “[I]t will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession.”<sup>341</sup>

Even if the acknowledgement of the political nature of the issues did not stop the court from analysing the legal implications, it makes clear that a demand of radically redefining the limits of the polity is a political issue which must be acknowledged and discussed by those politically implicated.<sup>342</sup> This is so even if one of the entities denies the role of the others.

## 2. THE OPENNESS OF THE PROCESS OF RECOGNITION OF NATIONAL IDENTITY

Once this preliminary issue of setting the limits of the debate is clarified, we can return to the main theme of this chapter: how can we recognise the role of national identities in modern constitutional democracies? In the introduction, I suggested that a process of constitutional recognition of multinationalism should be opened to *all* national identities and *any* political demand. I am drawing this idea from Habermas' earlier idea of communicative democracy.<sup>343</sup> In his theory of communicative action, Habermas argues that the openness of the communicative debate is one of the essential guarantees of

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<sup>341</sup> Reference Re the Secession of Quebec. 1998. Supreme Court of Canada. Available: [http://www.lexum.umontreal.ca/csc-ccc/en/pub/1998/vol2/html/1998scr2\\_0217.html](http://www.lexum.umontreal.ca/csc-ccc/en/pub/1998/vol2/html/1998scr2_0217.html). para.27

<sup>342</sup> The extraordinary valence of this decision in relation to the process of constitutional recognition of national identity is analysed by Tierney.S. Tierney, *Constitutional Law and National Pluralism*. (Oxford: Oxford University Press, 2004 (forthcoming)).

<sup>343</sup> J. Habermas, *The Theory of Communicative Action*, (London: Heinemann, 1984). This idea of a normative relationship can be found in previous works such as J. Habermas, *Toward a Rational Society : Student Protest, Science and Politics*, (London: Heinemann Educational, 1971), J. Habermas, *Legitimation Crisis*, (London: Heinemann, 1976). but it is in a theory of communicative action that Habermas structures his critique of capitalistic society in an alternative model of social cohesion.



legitimacy and rationality of agreements formed within the political arena. Even if I explained that some of the conclusions which he derives from this hypothesis are incongruent with the principle upon which he builds his theory (Chapter 3), I agree that the openness of the public debate is an essential element in any democratic discussion. It is by opening the political debate to any claim, that we can aspire<sup>344</sup> to create a linkage between statutes (*leges*) and the members of the polity (*demos*). However, the idea of not limiting the debate over the recognition of national identity is problematic. If there are no criteria for discriminating political claims, how can we evaluate them? Can a political debate reach rational decisions? Should we exclude extreme political demands which want to subvert democracy?

These issues can be separated in two groups. On the one hand, we have the problem of how to make a political debate work as a decisional process. As I explained in chapter 5, a political arena has to adopt some criteria for evaluating and rebutting political claims. The idea of opening the debate to all political demands cannot provide these criteria. We discussed this problem on our analysis of Laden's idea of radical liberalism.<sup>345</sup> A theory, which does not set absolute and universal criteria for assessing political claims, is providing relativistic

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<sup>344</sup> The connection between these two elements is sustained by a practice which can only aspire to achieve legitimacy. For direct analysis of this point see: E. Christodoulidis, *Law and Reflexive Politics*, (Dordrecht: Kluwer, 1998), F. Ost and M. Van. Hoecke, *Temps Et Droit : Le Droit a-T-Il Pour Vocation De Durer? = Time and Law : Is It the Nature of Law to Last?*, (Bruxelles: Bruylant, 1998).

<sup>345</sup> By opening the political arena to any claims we make democracy pragmatically flimsy (Chapter 5). The use of the adjective pragmatic might confuse the reader; the problem of pragmatic flimsiness of theory is a 'normative' issue. At first sight, Laden's choice of words seems unfortunate, but it is based on the idea that any participant into a debate pragmatically needs to set the criteria for measuring the different issues it intends to discuss. A. S. Laden, "Outline of a Theory of Reasonable Deliberation." *Canadian Journal of Philosophy* 30/4 (2000), 551-80 p.571.

and irrational solutions to political issues. However, by adopting aprioristic standards of judgement, we falsify the process of recognition of a national identity. This dilemma cannot be normatively solved. To make the point clearer let us discuss a pragmatic case in which the criteria of the debate were aprioristically imposed. During the process of recognition of the Scottish national identity, the possibility of discussing the secession of Scotland was excluded by the members of the convention. This limitation<sup>346</sup> should have reduced what Laden calls the 'pragmatic flimsiness' (chapter 5) of the debate since a demand of secession is grounded on the ever-changing relationship between Scotland and UK central Government (not on universal criteria).<sup>347</sup> However, the aprioristic ruling out of the demands of secession had the indirect effect of pushing out of the debate the representatives of the Scottish National Party. This drove the debate over devolution to an unrepresentative constitutional agreement.

Let us see the details of this point. Authors like Oliver explains that before 1999 there was no institutional representation for national identities within the UK legislative system:

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<sup>346</sup> The reasons which supported this limitation are not to be discussed here. See how different authors elaborate for and against this point: N. McCormick, "Is There a Constitutional Path to Scottish Independence?" *Parliamentary Affairs* 53/4 (2000), 721-36, J. E. Murkens, et al., *Scottish Independence: A Practical Guide*, (Edinburgh: Edinburgh University Press, 2002). For a more general discussion on this matter: A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (Indianapolis: Liberty/Classics, 1982).

<sup>347</sup> This is even if nationalists suggest that the connection between state and nation is a universal requirement of any modern state. I explained that this point cannot be considered a self evident truth.

*“The unitary, centralized system also discouraged a sense of ‘multiple citizenships’ (Heater 1990 ch.9), in the population. There was until 1999 almost no political institutions apart from those at the centre and local authorities providing the opportunities for political experimentation or to foster a sense of belonging to a range of communities [...] There was confusion, especially among the English, between Britishness and Englishness.*

*Many English people thought of England as being a synonym for Britain. The Scot, the Welsh, and the members of the two communities in North Ireland, on the other hand, have a strong sense of national identity, sometimes along side and sometimes to the exclusion of, a sense of Britishness. But these identities could find almost no expression in formal political arrangement.”<sup>348</sup>*

This lack of institutional recognition of the multinational nature of the British society is not – and was not – a problem of parliamentary under-representation of Scotland within the UK parliament. Even

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<sup>348</sup> D. Oliver, *Constitutional Reform in UK*, (Oxford: Oxford University Press, 2003), p.242. See also: D. Heater, *Citizenship. The Civic Ideal in the World History, Politics and Education*, (London: Longman, 1990).

before the process of devolution went into its executive phase, the entities that Sloat calls Scottish elites (e.g. representatives of the Scottish industries, the Convention of the Scottish Local Authorities, Scottish Local Government Office, *etc.*) were confident about the adequacy of the Scottish political representation within the UK parliamentary system - and within the European Union -. <sup>349</sup> However, adequate democratic representation in the parliament does not guarantee the constitutional recognition of a national identity. In the case of the United Kingdom, Scottish nationalists argued that the British constitutional system bluntly undermined their identity.

The New Labour's executive acknowledged this lacuna in the UK constitutional system and favoured a process of institutional recognition of the UK's national identities. In Scotland this process started with a Constitutional Convention and ended with the approval of the Scotland Act 1998. <sup>350</sup> However, the democratic openness of the process, which guided the reform of the institutional recognition of the Scottish identity, was limited since the start by an aprioristic exclusion

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<sup>349</sup> A. Sloat, Scotland in the European Union (Brussels: Scotland Europe, 2001). See also: A. Brown, et al., Politics and Society in Scotland, (Basingstoke: Macmillan, 1996)., D. McCrone, Understanding Scotland : The Sociology of a Nation, (London: Routledge, 2001), S. Bulmer and M. Burch, "Organizing for Europe: Whitehall, the British State and European Union." Public Administration 76/4 (1998), 601-28, D. Scott, "Power to the People: Scotland Gave a Decisive 'Yes' to Devolution, but Its Response to a Scottish Parliament with Tax-Varying Powers Was Less Emphatic." Public Finance (1997), 16-19, G. Scott, "Two Nations?: After Devolution, the Scottish Parliament Will Have Some Influence over NHS Policy and Funding." Bma News Review (1998), 19, M. Raco, "Governmentality, Subject-Building, and the Discourses and Practices of Devolution in the UK" Transactions- Institute of British Geographers 28/1 (2003), 75-95, C. Jeffery, Devolution: What Difference Has It Made? Interim Findings from the ESRC Research Programme on Devolution and Constitutional Change (ESRC Devolution Programme, Institute for German Studies, University of Birmingham, Birmingham, 2004).

<sup>350</sup> The Scotland Act 1998. In contrast with what Tully suggests in his theory of multinationalism the institutional phase of the process of recognition of Scottish identity within the United Kingdom included the referendum only after the legislative approval but this is a pragmatic detail which does not change the normative aspect of a general theory of multinationalism.

of the right of secession of Scotland imposed by the convention.<sup>351</sup> The aprioristic limitation of the political debate made a direct impact on the first phase of the process of recognition that took place without the participation of the political stance – the Scottish National Party - that prompted the re-discussion of the role of Scotland within the Union. In spite of its unofficial status the convention saw the participation of 80% of the Scottish MPs and it prepared *de facto* a political blue print for the Scottish devolution.<sup>352</sup>

However, the Conservatives and the Scottish National Party - which are the two parties that consider themselves respectively the protectors of British and Scottish identity - refused to participate in the works of the convention. The reason suggested by the Tories for snubbing the convention was related to the weakening of the Union, whereas the reason given by the SNP was that independence was not on the agenda of the Constitutional Convention. The lack of participation on the first phases of the debate over changing the rules of recognition does not damage the coherence of the process, since the principle of openness of the political arena demands that no one should be forced to participate in the political debate. The Conservatives wanted to protect the interests of the Union and therefore in the case of the Scottish Constitutional Convention they were refusing to get involved in the

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<sup>351</sup> The reasons, which supported the insertion of this limitation, are irrelevant to the point I try to make here.

<sup>352</sup> D. Oliver, Constitutional Reform in UK, (Oxford: Oxford University Press, 2003).p.258 For a brief history of the Scottish Conventions see; M. Keating, "So Many Nations, So Few States: Territory and Nationalism in the Global Era", in ed/s J. Tully and A. Gagnon, Multinational Democracies, (Cambridge: Cambridge University Press, 2001), 39-65.



discussion – in a political arena that would see them as a powerless minority - over the reduction of the role of British identity they were bound to uphold. This response by the Conservatives is within the theoretical limits of open democracy. As Tully explains in his theory of constitutional multinationalism, the process of struggling for and against recognition is ‘multilogical’<sup>353</sup> and thus the Conservative’s self-exclusion from the process of constitutional recognition of the Scottish identity could be considered a political response.

However, the same reasoning cannot be applied to the SNP’s boycott of Scottish Constitutional Convention, since their self-exclusion was supported by the aprioristic exclusion of a political claim from the political debate.<sup>354</sup> Apart from the irony of making two political parties which in theory defend cosmopolitan ideas - New Labour and the Liberal Democratic Party<sup>355</sup> – the only active political entities on the

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<sup>353</sup> J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 1-35.p.20

<sup>354</sup> In this case, Tully would argue that this refusal to participate in the Constitutional Convention does not change the political significance of the Convention for the people of Scotland since the demand of external national self-determination is unreasonable within a constitutional system. Again, he supports this point with his *personal* reading of the Canadian Constitutional Court decision over the secession of Quebec. “*International Law holds that the right of self-determination of the people of peoples should be exercised normally within existing constitutional states. This is called the right of ‘internal self-determination. It consists in a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state’ (SC 1998, para.126). Apart from oppressed and colonial people, it is only if internal self-determination that they are said to have a right to ‘external self-determination’: that is, to activate the right of secede (SC 1998, para.134). Ibid.in ed/s p.31* He argues that there are two different claims of self-determination of the nation. The “*external*”, which demands independence and the creation of a new state (with a new constitution and new institutions) and the “*internal*”, which demands the reform of the existing constitutional rules of recognition. Tully asserts that only a claim of internal right of self-determination is admissible in a constitutional system. At first sight, this seems a misinterpretation of the court’s position over Quebec demand in the international law, but Tully is making a theoretical point, which has little to do with the relationship between nationalism and international law. He argues that the Scottish National Party’s decision not to participate - on the ground that external self-determination was not on the agenda – did not affect the legitimacy of the outcomes of the process of recognition because Scottish Nationalistic demands were incompatible with basic democratic principles. For a full version of the Canadian Supreme Court Decision see: D. Scheneiderman, *The Quebec Decision*, (Toronto: Lorimer, 1999). and *Reference Re the Secession of Quebec*, 1998, Supreme Court of Canada, Available: [http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2\\_0217.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html).

<sup>355</sup> We have already seen in the first chapter that New Labour embraces the so-called third way. On the one hand, it supports cosmopolitanism as an unavoidable trend of modernity. On the other hand, it



dialogue over the constitutional recognition of Scottish identity, the limits of nationalistic claims reveals the anti-democratic effect of excluding political claims from a debate over the constitutional recognition of national identity. This led to a political agreement unsupported by a part of the Scottish population. This antidemocratic effect is not reduced by the referendum. During the political campaign which preceded it, the SNP took a political position on the “yes or no” debate. However, the act which creates the Scottish Parliament was the result of a process which aprioristically excluded a political stance. This example gives a clear indication of the effects of setting aprioristic criteria in a process of recognition: standards of evaluation do not reinforce the coherence of the decisions taken by the political debate; they only make them democratically precarious.

#### A) DEMOCRATIC RISKS AND NORMATIVE FLIMSINESS

The second problem related to the idea of opening of the debate over recognition has to do with the possible consequences of accepting any political claims. The lack of restraint on what is acceptable in a democratic arena might alter the basic democratic principles which underpin democracy. Laden points out that if we allow all claims into

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considers nationalistic demands as a sociological feature which a political party has to accommodate. In comparison with the New Labour, the policy of the Liberal Democrats is clearer. They are unquestionably committed to traditional liberal values (freedom, equality and reduction of government intervention on economy) and consider cultural diversity as an element of any democratic society which might be supported if it reduces the level of centralisation of state's power. See for instance:

The Scottish Liberal Democrats' Manifesto, (2001), available:

URL: <http://www.scotlibdems.org.uk/manifestos/ge2001/index.htm>.

However, it would be a mistake to consider liberal Democrats committed to a form of sedated British nationalism. Their attitude toward nationalistic claims is truly cosmopolitan, and it is proved by their pro-European position. See for instance: The Scottish Liberal Democrats' European Election Manifesto, (2003) <http://www.scotlibdems.org.uk/manifestos/pre2004/index.htm>.

the political arena, we might have cases in which an antidemocratic proposal collects enough political support for making the electorate degenerate into demagoguery or dictatorship.<sup>356</sup> He calls this problem the 'normative flimsiness' from a theory cut adrift of substantive values since it is normatively illogical to accept political inputs which want to destroy the democratic arena. We saw earlier (chapter 5) how Laden tries - but fails - to solve these problems by proposing a procedural system which aprioristically decides which political entities are allowed into the political debate.

This - again - seems another dilemma of the process of recognition of a national identity. On the one hand, we are all concerned when political entities put forward claims that endanger the foundations of our democracies. Should we accept a claim that politically excluded black people supported by the idea that this is the only way we can protect a white national minority? Should we accept that female members of a nation have no political rights since this conforms to the tradition of that national identity?<sup>357</sup> Should we reject democracy and adopt a military regime on the grounds that this better represents our national aspiration?<sup>358</sup> On the other hand, aprioristic limitations of the political arena *de facto* exploit the process that sustains democracy. If the process of recognition of national identity is limited by some

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<sup>356</sup> A. S. Laden, "Outline of a Theory of Reasonable Deliberation." *Canadian Journal of Philosophy* 30/4 (2000), 551-80p.572

<sup>357</sup> This question is often seen on the debate over the protection of original inhabitants of former colonies.

<sup>358</sup> The referendum which annexed Austria to Hitler's Germany is an historical example of how a democratic community can democratically decide to degenerate into a dictatorship.

broad procedural limitations,<sup>359</sup> national identities will appear unrepresented by the decisions taken by the political arena.

There are two possible answers to this dilemma. The first is to consider it a risk that a democracy has to take if it wants to maintain the connection between people, democracy and legal systems. We saw the details of this point in chapter 3 when I rejected Habermas' idea of aprioristically excluding nationalistic claims. Theoretically, this seems like the only solution, but it does not reduce the risks associated with an open process of recognition; instead, it accepts it as an unavoidable element of modern democracy.

The second answer to the dilemma of protecting democracy without limiting its political decisions is to reconsider the democratic principle of majority will. I draw this idea from Kymlicka's analysis of the relationship between democracy and multinational states: "[T]*here is more than one political community, and [...] the authority of a larger state cannot be assumed to take precedence over the authority of the constituent national communities.*"<sup>360</sup> Kymlicka suggests that a democratic majority cannot be used for imposing decisions on a national minority that has democratically decided against that particular choice. This prospective seems endorsed by institutions such as the Canadian Supreme Court:

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<sup>359</sup> Such as the ones proposed by Habermas and Tully

<sup>360</sup> W. Kymlicka, "Is Federalism an Alternative to Secession?" in ed/s P. B. Lehning, *Theories of Secession*, (London: Routledge, 1998), x, 262. p.140

*"The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights."*<sup>361</sup>

At first sight, this solution does not solve the problem of the 'normative flimsiness' of the process of recognition. We still have the possibility that a claim gathers enough political consensus to change a democratic political system into an antidemocratic regime. In other words, there are no guarantees that an internal decision supported by a unanimous majority would not make a democracy degenerate into a dictatorship. However, the possibility of having a unanimous consensus over a political issue is explicitly excluded in the

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<sup>361</sup> Reference Re the Secession of Quebec. 1998. Supreme Court of Canada. Available: [http://www.lexum.umontreal.ca/csc-ccc/en/pub/1998/vol2/html/1998scr2\\_0217.html](http://www.lexum.umontreal.ca/csc-ccc/en/pub/1998/vol2/html/1998scr2_0217.html). para. 93

presuppositions of this thesis that considered the process of recognition of national identity as an antagonistic process supported by a culturally differentiated society (chapter 3-4).

If this issue is put aside, there are another two problems with Kymlicka's idea. First, it seems to support a 'dictatorship of the minorities' where any decisional process can be stopped by a minority group. This is again a practical possibility; a national minority might intervene (or refuse to do so) in the political debate with only the intention of disrupting the democratic process. We saw in the example of the Scottish Devolution how the Tories refused to intervene into the debate over the recognition of the Scottish identity with the obvious intention of eroding the political support to the constitutional convention. However, a strategic boycott of the constitutional convention is a political rejection of its political agenda. The reasons which motivate this rejection should be discussed in the democratic arena. Second, this hypothesis in which minority and majority groups have to agree over a particular issue seems highly theoretical. However, the process of recognition of Northern Irish national identities follows a similar scheme with positive result. The Northern Ireland political arena is extremely diversified but it can be defined along the lines of the ethnic separation between two national groups. On the one hand, there is the Irish minority which wants the unification of Ulster with the Republic of Ireland. On the other hand, however, there are the British nationalists who want to maintain a



close linkage with Great Britain. The ethnic tension between the two communities escalated in a civil war which ended (at least for the majority of the population) with the Belfast Agreement.<sup>362</sup> The Northern Irish process of recognition of the two identities started with a constitutional convention<sup>363</sup> that included the full spectrum of the Northern Irish political arena and ended with three referenda (one each of the Northern Irish communities and one in the Republic) which endorsed the Belfast Agreement. Notwithstanding that the relationships between different national identities were extremely tense, and all parties had the possibility to halt the recognition process, they reached a common agreement.<sup>364</sup> As I explained in the first three

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<sup>362</sup> The division between the two groups became acute during the sixties when it supported an armed conflict between the two factions. The strategic support of the two groups by Ireland and the United Kingdom did little to reduce the scale of the conflict. For the great majority of the Northern Irish population, this conflict ended in May 1998 with the positive endorsement of the Belfast or "Good Friday" Agreement. In contrast with the Scottish devolution, Northern Ireland had its own parliament since 1922, but its activity was suspended in 1972 due to sectarian violence. After the suspension, the United Kingdom parliament approved the Northern Ireland Constitutional Act 1973 which prohibited parts of the province to leave the United Kingdom without: previous authorisation of the Northern Irish parliament, and a referendum which involves the entire population of the province. After 1974, Northern Irish parliament was able to operate only for a brief period, the devolution process was suspended and the province was administered directly by the UK central government. The Belfast Agreement is available on line: URL: <http://www.nio.gov.uk/issues/agreelinks/agreement.htm>.

<sup>363</sup> S. O'Neill, "Mutual Recognition and Accommodation of National Diversity: Constitutional Justice in Northern Ireland", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 223- 56. See also: D. Oliver, *Constitutional Reform in UK*, (Oxford: Oxford University Press, 2003).

<sup>364</sup> This idea of proportional political representation of national identities has carried on the administrative setting of the region since the agreement obliges the Northern Irish Executive to coordinate its policies with representatives of all the representative of Northern Irish political entities. The first strand of the agreement provides that: "*There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including :a)allocations of Committee Chairs, Ministers and Committee membership in proportion to party strengths.*" (1998). The Northern Ireland Act 1998. para. 5. Available on line: URL: <http://www.nio.gov.uk/issues/agreelinks/agreement.htm>. The second discusses the relationship between North and South of Ireland, and the third controls the rapport between the Republic of Ireland and the United Kingdom. In both strands, there are provisions for making the Ministerial and the British-Irish councils. Even if the role of the two institutions are quite different, their aim is to coordinate policies which have effect across the community and state borders of the different communities. The North/South Ministerial Council and the "Council of the Isles" – as the British Irish Council is colloquially known – have the task to harmonise policies in devolved matters like social inclusion, economy, the environment, trade and business development, etc. -. This makes the two organisations representative of the interests of the Irish national identities - not the interests of the UK or the Irish state -. The valence of the agreement is not reduced by the pragmatic difficulties on issues such as IRA's weapons decommission. The deadlock on this debate – like on many others – has brought to a halt the devolution process. For many reasons this is unfortunate, nonetheless it is part of the instability of the agreements related to the dynamic process of recognition of identity. However, the review of previous



chapters, we cannot derive a normative point from the analysis of a single process of recognition; however we can consider some of the pragmatic effects that the equality of majorities had on a process of recognition of national identities. First, a comparative analysis of two UK processes of recognition of national identities reveals how the Northern Irish one has enhanced the protection of basic democratic values.<sup>365</sup> We do not need to debate the details of this point, since we cannot know how the accord would have been if the parts involved had adopted the principle of the rule of one majority. Second, and most importantly, the Belfast agreement is democratically supported by all groups involved. Again we cannot draw from an analysis a single case a general principle, but it gives some indication of the practical possibilities of this idea.

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decisions taken is part of the dynamic of the process of recognition of national identities, and it should come as no surprise that it has happened and it will happen again (chapter 4). We have to remember that national identities are dynamic political entities that cannot be tied up in an unmovable political agreement. This should not detract from the fact that an open democratic debate - part of an open process of recognition of national identity - has managed to create a legitimate linkage between identities that apparently did not have any desire to share any political decisions.

<sup>365</sup> In the Belfast Agreement, the endorsement of Human Rights starts from the 1. para of the declaration of support and continues through out the text. For instance in Strand one, Democratic institutions insert the European Convention on Human Rights for safeguarding the democratic process on the province. (1998), The Northern Ireland Act 1998. para. 1; 5. Available on line: URL: <http://www.nio.gov.uk/issues/agreelinks/agreement.htm> This is, even if we read this increase of the democratic protection of the Northern Irish communities as a constitutional entrenchment of Human Rights. D. Oliver, *Constitutional Reform in UK*, (Oxford: Oxford University Press, 2003). As I made in chapters 3, 5, National identities - or other political entities - can demand the enforcement of Human Rights for protecting their identities. The requirement of openness of the debate over recognition does not prevent national communities from proposing and adopting policies grounded on Human Rights theories, or indeed other substantial political analyses. It is a mistake to confuse the exclusion of any aprioristic criteria for evaluating political demands endorsed in this thesis with their admissibility in the political arena as underpinning reason for a political claim. The openness of the process of recognition, which I so strongly advocated against Habermas and Tully, is a theoretical requirement of the political debate which has nothing to do with the national group's strategic protection of their identity. However, we should not assume that the protection of Human Rights is an aprioristic requirement of the process of recognition of national identities. As I argued before, this idea eschews democracy.

## B) THE ROLE OF CONSTITUTIONAL COURTS IN THE PROCESS OF RECOGNITION OF NATIONAL IDENTITY

In the previous sections, we discussed the two normative problems of opening the process of recognition of national identity. I answered that the pragmatic flimsiness of an open debate cannot be theoretically solved. Instead, we have to rely on the democratic arena for deciding the criteria to use for recognising the political role of a national identity. I also suggested that the risks of opening the process of recognition might be accepted as a 'price to pay' for maintaining the democratic coherence of our theory, or might be controlled by endorsing the equivalence of majorities<sup>366</sup> which is the idea suggested by Kymlicka<sup>367</sup> and endorsed by the Canadian Supreme Court.<sup>368</sup> The court in its '*Reference re Secession of Quebec*' explains that the will expressed by the majority of the Canadian population cannot eclipse the majority will of the Quebecois, but it limits their demands to the respect of basic principles of a modern constitutional democracy: "*federalism, democracy, constitutionalism and the rule of law, and respect for minorities.*"<sup>369</sup> The extraordinary valence of this decision might suggest that jurisdictional entities should be inserted as independent referees into an open process of recognition of national

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<sup>366</sup> This last hypothesis cannot be explored here since its account would need a comparative sociological analysis of the effects of different processes on the recognition of national identity.

<sup>367</sup> W. Kymlicka, "Is Federalism an Alternative to Secession?" in ed/s P. B. Lehning, *Theories of Secession*, (London: Routledge, 1998), x, 262.

<sup>368</sup> *Reference Re the Secession of Quebec*. 1998. Supreme Court of Canada. Available: [http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2\\_0217.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html).

<sup>369</sup> Ibid. para.32

identity. This should provide a protection against antidemocratic abuses and help to solve the problem of normative flimsiness (we discussed in the previous section). However, the duty of a Constitutional Court is to uphold the constitution, not to police the political arena.

There are two reasons for denying a role to the constitutional court in a process of recognition of a national identity. First, courtrooms are not a substitute of the democratic forum. While courts can guarantee political rights they cannot serve as vehicles of a democratic dialogue (as sometimes suggested, e.g. Michelman<sup>370</sup>), they use the legal system as reference for responding to questions they are bound to answer and therefore their analysis of a political claim is aprioristically restricted by previous political decisions. By adopting this procedure a society becomes divided between those who manage to make legitimate claims by linking them up to pre-existing legal norms and those who cannot. As Christodoulidis points out, and he quotes Luhmann's *Social Systems*<sup>371</sup> to support his idea, legal institutions settle legal indeterminacy 'by' using the legal system 'for' the legal system<sup>372</sup>.

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<sup>370</sup> See for instance: F. I. Michelman, "Terry Firma: Background Democracy and Constitutional Foundations." *Michigan Law Review* 99/8 (2001), 1827-52, F. I. Michelman, "The Problem of Constitutional Interpretative Disagreement", in ed/s M. Aboulafia, *et al.*, *Habermas & Pragmatism*, (London ; New York: Routledge, 2002),

<sup>371</sup> N. Luhmann, *Social Systems*, (Stanford: Stanford University Press, 1995).

<sup>372</sup> E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society." *European Law Journal* 9/4 (2003), 4001-432 See also: E. Christodoulidis, *Law and Reflexive Politics*, (Dordrecht: Kluwer, 1998). and N. Luhmann, *Social Systems*, (Stanford: Stanford University Press, 1995).

*“The ambit of all that can be contested is delimited by institutional categories that determine the who, the how and then when of constitutional politics. [...] To the extent that constitutional theorists, from Habermas to Tully, elevate law into the centrepiece of social deliberation, they do establish the possibility of a meaningful argumentation in context, ‘but at the cost of remaining reflexive over the contextual conditions’ [Italic on the original text]. Legal argumentation as practical discourse is ‘always-already disciplined by’ [Italic on the original text] the contextual conditions, therefore no longer reflexive ‘about’ [Italic on the original text] them.”<sup>373</sup>*

In contrast to this point, authors such as Tully argue that a constitutional account of a political claim and the democratic praxis are equivalent. From this hypothesis, he derives that the limitations adopted for discussing legality and admissibility of nationalistic claims can be extended to the democratic debate. “[I]f there are peoples or nations in the constitutional association, then the constitution of multinational democracies must find a way to reconcile

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<sup>373</sup> E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society." *European Law Journal* 9/4 (2003), 4001-432p. 413; 415. [My Emphasis]

*their exercise of the right of self-determination with the requirements of [constitutional] unity and with the other forms of diversity in the association”.*<sup>374</sup> However, considering the unity of the legal system as a limitation of the democratic debate is democratically incoherent. In this respect, the Canadian Supreme Court seems more aware than Tully of the political nature of the Quebecois demand of secession.

*“[T]he Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. [...] In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.”*<sup>375</sup>

Not only has the court itself-limited its competence to the legal implications of a demand of unilateral secession, but also argued that it cannot interfere with the negotiation process:

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<sup>374</sup> My emphasis: J. Tully, "Introduction", in ed/s J. Tully and A. Gagnon, *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001), 1-35.p.31

<sup>375</sup> My Emphasis. Reference Re the Secession of Quebec. 1998. Supreme Court of Canada. Available:[http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2\\_0217.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html). . para.26 The court continues in para. 28. "As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them."

*"The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. [...] Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other."*<sup>376</sup>

At first sight, it seems ironic that an argument against the idea of using a constitutional court in a process of recognition is provided by a court's decision. However, it is part of the court to assess its own competences and limiting his analysis to the mandate given to it by the constitution.

Second, a nationalistic claim which wants to radically change the institutional framework of a community - such as the one of unilateral secession - cannot be analysed by a constitutional court. As Christodoulidis explains in his analysis of the relation between constitutional pluralism and temporality we cannot expect a constitutional institution to re-discuss its foundations.

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<sup>376</sup> Ibid. para 100



*"In temporal terms the much elaborated problem of reconciling constitutionalism to the democratic imperative might be put like this: the democratic imperative requires that the 'current' [Italic on the original text] voice of the people register as binding law for the 'future'[Italic on the original text]. And yet to register as such a democratic voice simultaneously requires a prior 'scheme of interpretation' (Kelsen's words) to give it its meaning as law."*<sup>377</sup>

The issue, here, is not whether the Canadian Supreme Court or other jurisdictional institutions might allow the *Québécois* unilateral secession or not, but whether national communities can be limited in their quest for recognition by an institution like the Canadian Supreme Court. If a theory of multinational democracy is taken to its logical extreme, the answer should be negative. A court draws its decisional power from the constitutional norms and cannot limit a political redrawing of these norms. This is more evident in the case a polity decides to change – in a radical sense - these norms and create a new democratic constitutional entity since the new state cannot be bound to

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<sup>377</sup> E. Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society." *European Law Journal* 9/4 (2003), 4001-432p.418 Again I have to stress that this point is made here to criticise Tully's angle on multinationalism not the whole theory. The democratic phases – internal, external and institutional - which form the back bone of the process of recognition of national identity in multinational society are unaffected by denying the involvement of a constitutional court and its evolution of the non violation of liberal rights.

the decision of the one it used to be part. This point, again, is clearly acknowledged by the Canadian Supreme Court.<sup>378</sup>

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<sup>378</sup> Reference Re the Secession of Quebec. 1998. Supreme Court of Canada. Para.100

## CONCLUSION

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I structured our debate over the role of nationalism in modern democracy in two parts. The first part (chapter 1 – 3) focuses on the various theories that support nationalism and cosmopolitanism. As we saw in chapter 2, both points are based on unverifiable assumptions. On the one hand, cosmopolitans such as Habermas<sup>379</sup> and Ignatieff<sup>380</sup> argue that nationalism is dangerous political phenomenon. They argue the concept of national identity is grounded on sets of mental images<sup>381</sup> that create an irrational sense of belonging to the national community. Historically, these images have been endorsed by political parties for implementing policies of racial and ethnic segregation. Thus, a polity that cares for the protection of its democratic values should rule out nationalistic claims from democracy. On the other hand, nationalists such as, Canovan,<sup>382</sup> MacCormick,<sup>383</sup> Miller,<sup>384</sup> and Smith<sup>385</sup> argue that

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<sup>379</sup> J. Habermas, "The European Nation State: On the Past and Future of Sovereignty and Citizenship", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), :105 - 27, J. Habermas, *The Postnational Constellation : Political Essays*, (Cambridge, UK: Polity Press, 2001), J. Habermas, "On the Relation between the Nation, the Rule of Law and Democracy", in ed/s P. De Greiff, *The Inclusion of the Other : Studies in Political Theory*, (Cambridge: Polity, 1999), p. 128 - 53.

<sup>380</sup> M. Ignatieff, *Blood & Belonging : Journeys into the New Nationalism*, (London: Vintage, 1994), M. Ignatieff, *The Warrior's Honor : Ethnic War and the Modern Conscience*, (London: Vintage, 1999).

<sup>381</sup> This idea is drawn from B. Anderson, *Imagined Communities : Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

<sup>382</sup> M. Canovan, *Nationhood and Political Theory*, (Cheltenham: Edward Elgar, 1996).

<sup>383</sup> N. MacCormick, *Can Nationalism Be Intellectually Respectable?*, 1991), N. MacCormick, *Questioning Sovereignty Law, State and Nation in the European Commonwealth*, (Oxford: Oxford University Press, 1999).

<sup>384</sup> D. Miller, *On Nationality*, (Oxford: Clarendon Press, 1995).

the political stability of modern democracy is based on nationalism. This gives to nationalistic claims a special status which makes them incomparable with other political entities. It is – nationalists argue – the loyalty to the national groups which morally and politically underpin the validity of the decisions taken by the political arena. These analyses seem completely different, yet they have something in common. First, these proposals consider the finds historical accounts as axiological<sup>386</sup> (i.e. historically nationalism is a dangerous political movement) and they use them to support their claims (i.e. nationalism should be excluded from democracy). However, I explained that both cosmopolitan and nationalistic demands are based on a relativistic analysis of the role of nationalism in modern society. These analyses cannot be used to support normative claims such as an aprioristic exclusion of national identities from democracy or an unquestioned endorsement of nationalistic claim (chapter 2-3). Why is this? There is a direct relationship between the practice of discussing political claims and democracy. A political theory cannot aprioristically exclude political entities - or its political claims – except at the cost of democracy.<sup>387</sup>

I tried to show that the first phase in any democratic debate, which involves national groups, is the recognition of their identity. National

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<sup>385</sup> A. D. Smith, *Theories of Nationalism*, (London: Duckworth, 1971), A. D. Smith, *The Ethnic Revival*, (Cambridge: Cambridge University Press, 1981), A. D. Smith, *Nationalism : Theory, Ideology, History*, (Cambridge: Polity Press ; Blackwell, 2001).

<sup>386</sup> In the case of Ignatieff and Anderson, a psychological analysis is used for underpinning their thesis.

<sup>387</sup> I explained that from a democratic point of view, we cannot differentiate between nationalist claims and a chess club's demands. Both claims are equal and their validity should be discussed in a political arena.

identities should be constitutionally recognised as one of the elements of a modern pluralistic society that contribute with their political claims to the democratic practice of making political decisions. By constitutionally acknowledging the role of national identities in modern society, we prevent their exclusion from the political arena on the ground that they are irrational social phenomena. I use the example of the protection of religious (chapter 3) freedom endorsed in all modern constitutions that allows debates over political claims proposed by religious groups without questioning the rational basis of their beliefs. This increases the number of political discussions which enter the democratic arena. Given that there is a direct link between the level of participation in political debates and democracy, the protection of freedom of faith indirectly increases the democratic coherency of political decisions. I suggested on similar ground one should support the recognition of national identities. However, the process of recognition of national identities is problematic; how can modern constitutional democracy accommodate ethnocentric political claims? Can we allow nationalistic demands that discriminated against women or immigrants? Should a white national minority discriminate against a black majority for protecting its identity? Should we allow a national group to use the political arena for amplifying racist demands?

I answered these questions in the second part of the thesis. I suggested that we cannot limit these demands without making the process of

recognition of national identity pointless (chapter 4-6). This idea, which is summarised in the principle of the openness of the democratic debate, is drawn from Habermas' theory of communicative democracy. Again, it seems a little ironic that I have drawn from Habermas' analysis an argument in favour of allowing nationalistic claims into the political arena, but, the reasons which support my idea of opening the political arena are quite different. The idea of openness suggested in this thesis guarantees the democratic coherence of the process of recognition of national identities; whereas Habermas' openness is a procedural requirement of his theory of constitutional patriotism which wants the aprioristic exclusion of irrational nationalistic claims from the political arena. I made it clear (with the example of a debate between a Jewish settler and a Palestinian landowner) that a political debate cannot be open, if we use previous political decisions for deciding which entity is allowed into a democratic debate. This process eschews democracy.

Can a national identity use the political arena for amplifying antidemocratic political demands? This is a delicate issue since a debate over a racist claim proposed by a national group produces its dividing effects in a community without the need of political approval. For instance, an Italian political party, the Lega Nord which demand s the independence of North Italy, has used the protection of political freedom in a relentless campaign against the inhabitants of southern



Italy whom are portrayed as lazy and dishonest.<sup>388</sup> Should we allow these political claims in a modern constitutional democracy? To this problem there are no easy theoretical answers: I explained that constitutional courts can protect rights but cannot decide over the admissibility of political claims nor set a procedure which precludes the democratic evaluation of political demands (chapter 5). However, the solution suggested by Kymlicka and endorsed by the Canadian Supreme Court might help limit the antidemocratic effects of these claims. “[T]wo legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “trumps” the other.”<sup>389</sup> This idea seems highly theoretical, but it has been endorsed during the process of recognition of the Northern Irish national identities and might provide an attractive model for a polity which recognises the democratic role of national identities but wants to protect the political arena from the abuses of antidemocratic groups.

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<sup>388</sup> In 1990s the campaign of the Lega Nord used the finding of a group of investigators (which drove to the resignation of 70% of the MPs) for denouncing the chronic level of corruption of the Italian central government based in Rome. Firstly they won the administrative election in Milan (1992), then (1997) they joined a coalition which won the national political election. If we exclude the brief parenthesis of Prof. Prodi's executive, the Lega Nord has been the second most influential political party (with Berlusconi's Liberal Party) on the Italian executive for the past 7 years.

<sup>389</sup> Reference Re the Secession of Quebec. 1998. Supreme Court of Canada. Available: [http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2\\_0217.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html). para. 93

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